TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 251

PANAMA CANAL COMPANY, PETITIONER,

vs.

GRACE LINE, INC., ET AL.

No. 252

GRACE LINE, INC., ISBRANDTSEN COMPANY, INC., LUCKENBACH STEAMSHIP COMPANY, INC., ET AL., PETITIONERS,

vs.

PANAMA CANAL COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 6, 1957

CERTIORARI GRANTED OCTOBER 14, 1957

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

DOCKET ENTRIES

Civ. 103-229

GRACE LINE, INC., ISBRANDTSEN COMPANY, INC., LUCKENBACH STEAMSHIP COMPANY, INC., Matson Navigation Company, Moore-McCormack Lines, Inc., Ore Navigation Corporation, Calmar Steamship Corporation, Pope and Talbot, Inc., States Marine Corporation of Delaware, United Fruit Company, United States Lines Company and Weyerhauser Steamship Company, (addt'l pltffs 12-8-55) National Bulk Carriers, Inc., American-Hawaiian Steamship Company, Ore Transport, Inc. and American Tankers Corporation

vs.

PANAMA CANAL COMPANY

Basis of Action: Public Law 841, 81st Congress, etc. Excess charges on toll rates, Panama Canal.

Attorneys for Plaintiff: Maclay, Morgan & Williams, 76 Beaver St. (5).

9/13/55 M. M. & W., Received $15.00.
9/16/55 Pd. U. S. Treas., Disbursed $15.00.
7/26/56 M. M. & W., Received $5.00.
July 27, 1956 Pd. U. S. Treas., Disbursed $5.00.

Sept. 13-55, Filed complaint and issued summons.
Sept. 16-55, Filed summons and return, served deft. 9-14-55.
Sept. 30-55. Issued additional summons.
Oct. 10-55. Filed additional summons and return, served deft. & USA (Tannenbaum, etc.) 10-3-55.
Nov. 3-55. Filed Affdvt. of service of Order to Show Cause.
Nov. 10-55. Filed pltffs' request for admission.
Nov. 10-55. Filed pltffs' notice of deposition.

Nov. 10-55. Filed pltffs' interrogatories.

Nov. 14-55. Filed stip. & order extending time to answer, etc. to 1-1-56, etc.—McGohey, J.

Nov. 16-55. Filed affvdt & notice of motion for intervention as parties pltff—ret. 11-29-55.

Oct. 28-55. Filed affdvt & show cause order—Motion by pltff for summary judgment—ret. 1-5-56.

Dec. 7-55. Memo endorsed on motion filed 11-16-55—Granted—Order signed—Dawson, J.

[fol. 2] Dec. 8-55. Filed order for intervening complaint and adding intervening pltffs.—Dawson, J.

Dec. 14-55. Filed affdvt & notice of motion by deft. to quash subpoena duces tecum re: Jos. Campbell—ret. 12-20-55.

Dec. 16-55. Filed affdvt & notice of motion to dismiss—ret. 12-22-55.

Dec. 20-55. Filed affdvt & show cause order—to modify order of Edelstein, J. dated 10-28-55-ret. 12-20-55.

Dec. 20-55. Memo endorsed on show cause filed 12-20-55—Granted as indicated upon argument—Settle order—Walsh, J.

Dec. 20-25. Filed affdvt & show cause order to adjourning depositions of J. Campbell & W. Newman, etc.—ret. 12-20-55.

Dec. 20-55. Memo endorsed on show cause re: adjournment filed 12-20-55—Granted as indicated upon argument—Settle order—Walsh, J.

Dec. 23-55. Filed deft's unsigned proposed order to quash.

Dec. 23-55. Filed order extending time of deft to serve & file answer affdvts to pltffs' pending motion for summary judgment to 12-29-55, etc.—Walsh, J.—Mailed notice of entry 12-27-55.

Dec. 23-55. Filed order adjourning taking of deposition of J. Campbell, et ano, to 12-29-55, etc.—Walsh, J.—Mailed notice of entry 12-27-55.

Dec. 20-55. Memo endorsed on motion filed 12-14-55—Consented to, settle order—Walsh, J.

Dec. 28-55. Filed order quashing subpoena duces tecum directed to Jos. Campbell—Walsh, J.—Mailed notice of entry 12-30-55.

Jan. 5-56. Memo endorsed on motion filed 10-28-55—Marked off pending decision of Judge Walsh on motion now before him—Bicks, J.

Jan. 10-56. Filed order—adjournments, extensions and reservations in orders of 12-22-55 further extended to date of determination of pending motion to dismiss, etc. Walsh, J.—Mailed notice of entry 1-12-56.

Jan. 12-56. Filed complaint of intervening pltffs. Nat'l Bulk Carriers, Inc., et al.

Feb. 2-56. Filed affdvt & notice of motion to intervene as parties pltff.—ret. 2-2-56.

Feb. 7-56. Memo endorsed on motion filed 2-2-56—Referred to Judge Walsh—Kaufman, J.

Feb. 21-56. Filed Affdvt. & Notice of Motion for third party pltf. Ret. 2-28-56. MM&W.

Jun. 27-56. Memo endorsed on motion filed 2-2-56. Motion granted pursuant to Rule 24(b)(2). Walsh, J. Mailed notice of entry 6-29-56.

Jun. 27-56. Memo endorsed on motion filed 2-21-56. Motion Granted. Pursuant to Rule 24(c)(2): Walsh, J. Mailed notice of entry 6-29-56.

Jun. 29-56. Filed Opinion #22751 and judgment (added 8-2-56) dismissing complaint. Walsh, J. Mailed notice of entry 6-26-56.

June 29-56. Filed Affdvt in opposition.

June 29-56. Filed Deft's affidavit in opposition to motion.

[fol. 3] July 26-56. Filed Notice of Appeal and on 7-27-56 mailed copy of George Cochran Doub, Asst. Atty. Gen., Wash., D.C.

July 27-56. Filed Cost Bond on Appeal—Indemnity Ins. Co. of N. America.

August 3-56. Filed transcript of record of proceedings as of December 20, 1955 and December 29, 1955.

Aug. 3-56. Filed Notice of Appeal. Mailed copy to George Cochran Doub, 607 U.S. Court House, Asst. Atty. Gen.

Aug. 3-56. Filed Appeal Bond. Indemnity Ins. Co. of North America NY.

[fol. 4] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

GRACE LINE, INC., ISBRANDTSEN COMPANY, INC., LUCKENBACH STEAMSHIP COMPANY, INC.; Matson Navigation Company; Moore-McCormack Lines, Inc.; Ore Navigation Corporation; Calmar Steamship Corporation; Pope and Talbot, Inc.; States Marine Corporation of Delaware; United Fruit Company; United States Lines Company; and Weyerhaeuser Steamship Company, Plaintiffs,

against

PANAMA CANAL COMPANY, Defendant

COMPLAINT—Filed Sept. 13, 1955

Plaintiffs, complaining of defendant by their attorneys, Maclay, Morgan & Williams, allege:

First: Plaintiffs are corporations organized and existing under the laws of the states of the United States. Plaintiffs own and operate ships documented under the laws of the United States. Plaintiffs bring suit on behalf of themselves and all other members of the class hereinafter described.

Second: Defendant is a corporation organized and existing under the laws of the United States, is wholly owned by the United States, and is an agency of the United States. Defendant is an inhabitant and resident of the Southern Judicial District of New York and may be sued in its corporate name.

[fol. 5] Third: The action arises under Public Law 808, 80th Congress, Second Session, and Public Law 841, 81st Congress, Second Session. The matter in controversy as between defendant and each plaintiff only, and apart from the other members of the class on whose behalf suit is brought, exceeds the sum of $3,000 exclusive of interest and costs.

Fourth: Defendant maintains and operates a canal traversing the Isthmus of Panama, known and herein referred to as the "Panama Canal."

Fifth: On July 1, 1951, it became defendant's duty, as provided by Public Law 841, 81st Congress, Second Session, and Executive Order 10263 issued by the President of the United States on June 29, 1951, to prescribe tolls for the use of the Panama Canal at a rate or rates calculated to cover as nearly as practicable all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances relating thereto, including interest and depreciation, and an appropriate share of the net cost of the operation of the agency known as the Canal Zone Government; to give six months' notice by publication in the Federal Register of any and all proposed changes in rates of tolls; and to conduct a public hearing during said period.

Sixth: Defendant has wholly and completely failed and neglected to act as provided by law, and has unlawfully withheld and unreasonably delayed such action. Defend- [fol. 6] ant has prescribed no tolls whatever and has conducted no public hearing. At all times since July 1, 1951, defendant has exacted from ships carrying cargo or passengers for transits through the Panama Canal a toll of ninety cents a ton, and from ships in ballast a toll of seventy-two cents a ton. Said rates had been exacted before July 1, 1951 and bear no relation to the formula provided by law.

Seventh: Plaintiffs' ships regularly use the Panama Canal. Since July 1, 1951, defendant has exacted from plaintiffs many million dollars in tolls for Panama Canal transits and continues to exact tolls in the millions of dollars annually for such transits, as more particularly appears in the table annexed hereto marked "Exhibit A."

Eighth: Defendant has published and publishes annually reports of its activities for fiscal years ending June 30. Said reports include financial statements. Said reports and financial statements have failed and neglected to state the costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances relating thereto, including interest and depreciation, and an appropriate share of the net cost of the operation of the agency known as the Canal Zone Government.

Ninth: According to defendant's published reports, it has, in the three-year period July 1, 1951-June 30, 1954,

realized operating income of $68,425,144 from the Panama Canal, together with the facilities and appurtenances, re-
[fol. 7] lated thereto, and net corporate income of $13,028,-533. The amount of net corporate income was reached by the addition of $12,401,567 operating income from other activities and the deduction of $67,798,178 administrative and other general expenses, costs of the operation of the agency known as the Canal Zone Government and interest payable to the United States Treasury, all unallocated as between maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, and defendant's other activities.

Tenth: The accounting determinations of the General Accounting Office are final and conclusive on all wholly owned corporations and agencies of the United States, but are not final and conclusive against plaintiffs.

Eleventh: The General Accounting Office has made determinations of the costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances relating thereto, including interest and depreciation, and an appropriate share of the net cost of the operation of the agency known as the Canal Zone Government. According to said determinations defendant, in the three-year period July 1, 1951-June 30, 1954, has realized revenue from the Panama Canal, together with the facilities and appurtenances relating thereto, exceeding the costs of maintenance and operation, including interest and depreciation, and an appropriate share of the net cost of the operation of the agency known as the Canal Zone Government, by $27,836,504.

[fol. 8] Twelfth: The General Accounting Office further determined that the losses from defendant's activities other than the maintenance and operation of the Panama Canal, together with the facilities and appurtenances relating thereto, amounted to $14,807,971, so that the $13,028,533 referred to in paragraph "Ninth" represented the $27,-836,504 excess collections after the deduction of the losses from the other activities.

Thirteenth: Plaintiffs are not aware of the amount of excess collections for the period subsequent to July 1, 1954, according to the accounting procedures of the General Accounting Office, but believe said amount to be over $10 million.

Fourteenth: The amounts of tolls paid by plaintiffs since July 1, 1951 are far in excess of the amounts payable at a rate or rates calculated to cover as nearly as practicable all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances relating thereto, including interest and depreciation and an appropriate share of the net cost of the operation of the agency known as the Canal Zone Government.

Fifteenth: By reason of defendant's failure to act, and defendant's unlawfully withholding and unreasonably delaying action provided by law, as aforesaid, and its collection of excessive tolls meanwhile, each plaintiff has suffered damages of many thousands of dollars, and damages [fol. 9] continue to accrue so long as defendant unlawfully withholds and unreasonably delays action.

Sixteenth: Since July 1, 1951, defendant has exacted tolls in the aggregate from commercial ships using the Panama Canal as follows:

Period	Tolls
July 1, 1951—June 30, 1952	$26,922,531
July 1, 1952—June 30, 1953	31,917,515
July 1, 1953—June 30, 1954	33,247,863
July 1, 1954—June 30, 1955	33,918,993

In addition, the Panama Canal has been used by United States Government ships for which defendant is paid tolls by appropriate intra-governmental credits, as follows:

Period	Amount
July 1, 1951—June 30, 1952	$ 3,413,728
July 1, 1952—June 30, 1953	5,557,682
July 1, 1953—June 30, 1954	3,888,957
July 1, 1954—June 30, 1955	1,217,536

The commercial ships using the Panama Canal flew the flags of thirty-five nations in the year ended June 30, 1955. The number in preceding years was similar.

Plaintiffs do not know the exact number of shipowners whose ships have used the Panama Canal since July 1, 1951, but estimate the number at approximately 700.

Seventeenth: All shipowners using the Panama Canal are entitled to equality of rates of toll irrespective of nationality.

[fol. 10] Eighteenth: All shipowners using the Panama Canal have the same interest as plaintiffs in compelling defendant's action hitherto unlawfully withheld and unreasonably delayed. All such shipowners severally suffered damages by reason of defendant's failure to act as provided by law. Such damages vary in amount according to the weight and number of their respective ships and the frequency with which they have used the Panama Canal, but otherwise the measure of damages is the same. Said shipowners constitute the class on whose behalf this action is brought. The character of the right sought to be enforced for the class is several, and there are common questions of law and fact and a common relief is sought.

Nineteenth: The shipowners using the Panama Canal are located throughout the entire world. Said shipowners are so numerous and scattered as to make it impracticable to bring them before the court. Plaintiffs will fairly insure the adequate representation of all.

Twentieth: Defendant's excessive and illegal toll charges against plaintiffs and their class for the period July 1, 1951—June 30, 1954 amount at least to the $27,836,504 determined by the General Accounting Office. Said excessive and illegal toll charges since July 1, 1951 have been substantially greater than $27,836,504.

Wherefore, plaintiffs demand:

1. That this Court declare the duty of defendant to proceed forthwith to prescribe tolls and conduct the public hearing provided by law.

[fol. 11] 2. That this Court enjoin and restrain the defendant from further unlawfully withholding and unreasonably delaying the prescription of tolls and the conduct of the public hearing provided by law.

3. That this Court issue its judgment and decree commanding and directing the defendant forthwith to prescribe tolls and conduct the public hearing provided by law.

4. That this Court enjoin and restrain the defendant, in the prescription of tolls, from using accounts less favorable to plaintiffs and their class than those determined by the General Accounting Office.

5. That during defendant's prescription of tolls and conduct of hearing as required by law and commanded by this Cour this Court retain jurisdiction of the cause and issue

appropriate orders and decrees that the defendant prescribe tolls and conduct the public hearing according to law.

6. That this Court impress a trust upon, and require defendant to account for, the tolls collected by it in excess of the costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances relating thereto, including interest and depreciation, and an appropriate share of the net cost of the operation of the agency known as the Canal Zone Government, by reason of defendant's unlawfully withholding and unreasonably delaying prescription of tolls as provided by law, together with interest, and also for such additional excess tolls as may be collected by defendant prior to defendant's performance of its duty.

7. That this Court award judgment and decree against defendant for damages suffered by plaintiffs and their class [fol. 12] by reason of its collection of excess tolls, such sum to be paid to the Clerk of this Court or such other depositary as the Court may appoint.

8. That this Court award summary judgment and decree against defendant for $27,836,504, to be paid to the Clerk of this Court or such other depositary as the Court may appoint.

9. That this Court distribute the moneys so paid as interest may appear.

10. That pending final judgment herein this Court issue appropriate orders and decrees to protect the plaintiffs and their class against the excessive tolls exacted by defendant by reason of its action unlawfully withheld and unreasonably delayed.

11. That this Court's final judgment herein include the costs of this action, together with such other and further relief as to the Court may seem just and proper.

Maclay, Morgan & Williams, by C. Dickerman Williams, A Member of the Firm, Attorneys for Plaintiffs, Office & P.O. Address, 76 Beaver Street, New York 5, N. Y.

Brobeck, Phleger & Harrison, 111 Sutter Street, San Francisco 4, Calif., Associate Counsel.

New York, N. Y.
September 13, 1955

[fol. 13] EXHIBIT A TO COMPLAINT

Tolls Exacted from Plaintiffs for Panama Canal Transits, July 1, 1951—June 30, 1955

Grace Line, Inc.	$3,579,930
Isbrandtsen Company, Inc.	494,548
Luckenbach Steamship Company, Inc.	2,919,938
Matson Navigation Company	1,122,005
Moore-McCormack Lines, Inc.	520,020
Ore Navigation Corporation	2,218,236
Calmar Steamship Corporation	1,403,704
Pope and Talbot, Inc.	1,867,502
States Marine Corporation of Delaware	2,112,758
United Fruit Company	4,701,045
United States Lines Company	1,517,294
Weyerhaeuser Steamship Company	1,167,807

[fol. 14] IN THE UNITED STATES DISTRICT COURT

ORDER TO SHOW CAUSE FOR SUMMARY JUDGMENT—October 28, 1955

On reading the affidavits of C. Dickerman Williams, sworn to the 26th day of October, 1955, Cassius C. Mallory, sworn to the 30th day of September, 1955, R. F. Pierce, sworn to the 5th day of October 1955, James Sinclair, sworn to the 28th day of September 1955, H. B. Perrin, sworn to the 30th day of September, 1955, S. L. Barbera, sworn to the 18th day of October 1955, Mark R. Kreidler (2), sworn to the 4th day of October, 1955, Jos. L. Paiva, sworn to the [fol. 15] 29th day of September, 1955, P. D. Barksdale, sworn to the 28th day of September, 1955, Louis S. Sisto, sworn to the 5th day of October, 1955, R. M. Hicks, sworn to the 29th day of September, 1955, and O. E. Fox, sworn to the 29th day of September, 1955, and on motion of Maclay, Morgan & Williams, attorneys for the plaintiffs herein, it is

Ordered, that defendants show cause at a term of this Court for the hearing of motions to be held in Room 506 of the United States Courthouse, Foley Square, City and

County of New York, on the 6th day of December, 1955, at 10 o'clock on the morning of said day, or as soon thereafter as counsel can be heard, why summary judgment should not be made herein under Rule 56 of the Rules of Civil Procedure:

1. Declaring the duty of defendant to proceed forthwith to prescribe tolls as provided by Section 12, Public Law 841, 81st Congress, propose changes in tolls as indicated by said prescription and conduct a public hearing, all according to law;

2. Enjoining and restraining the defendant from further unlawfully withholding and unreasonably delaying the prescription of tolls as provided by Section 12, Public Law 841, 81st Congress, the proposal of changes in tolls as indicated by said prescription and the conduct of a public hearing, all according to law;

3. Commanding and directing the defendant forthwith to prescribe tolls as provided by Section 12, Public Law 841, 81st Congress, propose changes in tolls as indicated by said prescription and conduct a public hearing, all according to law;

4. Enjoining and restraining the defendant in the prescription of tolls from using accounts less favorable to the plaintiffs and their class than those determined by the General Accounting Office;

5. Retaining jurisdiction of the cause so as to issue appropriate orders and decrees that the defendant prescribe [fol. 16] tolls, propose changes in tolls and conduct a public hearing according to law;

6. Declaring defendant liable in damages to plaintiffs and their class for its failure to prescribe tolls according to law;

7. Impressing a trust upon, and requiring defendant to account for, the tolls collected by it in excess of the costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances relating thereto, including interest and depreciation, and an appropriate share of the net costs of the operation of the agency known as the Canal Zone Government, by reason of defendant's unlawfully withholding and unreasonably delaying prescription of tolls according to law, together with interest, until tolls prescribed according to law take effect;

8. Appointing a Special Master under Rule 53 of the Rules of Civil Procedure to hear and report to this Court the amount of such excess tolls so collected by defendant;

9. Declaring that the amount of excess tolls so collected by the defendant from plaintiffs and their class during the period July 1, 1951—June 30, 1954, is not less than $27,856,504 (including toll credits), as ascertained and liquidated by the General Accounting Office;

10. Retaining jurisdiction of the cause so as to receive the report of the Special Master, enter appropriate judgment upon that report and distribute according to law to each plaintiff and each member of their class its proportionate share of the excess tolls;

on the ground that, except as to the amount of damages, there is no genuine issue as to any material fact and that the plaintiff is entitled to judgment as a matter of law; and it is further

[fol. 17] Ordered, that service of a copy of this order and of the papers upon which it is granted, made upon defendant and the United States Attorney for the Southern District of New York, and by registered mail to the Attorney General of the United States, on or before October 28, 1955, shall be sufficient, except that copies of the exhibits annexed to the affidavit of C. Dickerman Williams which are official publications of the United States may be omitted from the copies of the papers served upon the defendant and the United States Attorney for the Southern District of New York, and it is further

Ordered, that defendant serve its answering affidavits herein on plaintiffs' attorneys not later than November 25, 1955; and it is further

Ordered, that plaintiffs may serve reply affidavits herein upon the United States Attorney for the Southern District of New York and by ordinary mail, special delivery, upon the Attorney-General of the United States, not later than December 1, 1955, except that copies of those exhibits to the reply affidavits which are official publications of the United States may be omitted from the copies of the reply affidavits which are served upon the United States Attorney for the Southern District of New York.

David N. Edelstein, U. S. D. J.

October 28th, 1955, New York, N. Y.

[fol. 18] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss.:

C. Dickerman Williams, being duly sworn, deposes and says:

1. I am a member of the firm of Maclay, Morgan & Williams, attorneys for the plaintiffs, and am familiar with the pleadings and proceedings herein. This affidavit is submitted in support of plaintiffs' motion for summary judgment under Rule 56 of the Rules of Civil Procedure.

[fol. 19] Relief Sought

2. The relief sought on this motion is, in substance, summary judgment and decree (1) requiring the defendant to prescribe tolls and propose changes in tolls as required by Public Law 841 of the 81st Congress, hereinafter referred to as Public Law 841; (2) appointing a Special Master to hear and report the damages suffered by plaintiffs and their class, by reason of defendant's failure to act until tolls prescribed according to law take effect, and (3) declaring that plaintiffs and their class have been overcharged not less than $27,836,504 in tolls and toll credits from July 1, 1951 to June 30, 1954 as ascertained and liquidated by the General Accounting Office.

Basis of Motion

3. Reduced to simplest terms, the motion is based upon Section 12 of Public Law 841 and the audit report of the General Accounting Office of defendant's affairs for the fiscal year ended June 30, 1954.

Section 12 of Public Law 841, officially published at Volume 64, page 1038 of the United States Statutes at Large, enacts, *inter alia*, Section 412(b) of the Canal Zone Code, as follows:

> "(b) Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including interest and depreciation, and an appropriate share of the net costs of operation of the

agency known as the Canal Zone Government. In the determination of such appropriate share, substantial weight shall be given to the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government."

[fol. 20] The GAO audit report for 1954 (an official publication of this report is annexed hereto, marked "Exhibit A") sets forth calculations showing that defendant's toll collections July 1, 1951-June 30, 1954 exceeded the costs referred to in Section 12 by $27,836,504. Reference is made to the table appearing at page 13 of this report, Exhibit A, particularly the following column:

	Three years ended June 30, 1954 Canal activity
Revenue	$112,861,870
Operating expenses, including adjustments in 1954 to prior years' retained income	44,436,726
Operating income	68,426,144
General corporate expense (allocated by General Accounting Office):	
Net cost of Canal Zone Government (note a)	19,153,898
Interest payable to U. S. Treasury (note b)	18,518,673
Administrative and other general expenses (note c)	2,916,069
	40,588,640
Net income (−loss)	$ 27,836,504

(a) Net costs of Canal Zone Government are allocated on the revenue ratio defined in section 412(b) of the Canal Zone Code. This results in an allocation of 65 percent of these costs to the canal activity for 1954, 63 percent for 1953, and 55 percent for 1952. If the allocation were to be made on the basis of gross investment in fixed properties (see recommendation to the Congress, p. 9), about 78 percent of the costs would have been allocated to the canal activity.

(b) Interest for the fiscal years 1952, 1953, and 1954 is computed at 1.95, 2.05, and 2.342 percent, respectively, on $377,764,946, the net direct investment of the Government in the Company. Comments on interest expense are contained on page 19.

The capital base, that is, the gross investment in fixed properties, at June 30, 1954, used for allocating interest to all activities is $587,829,356 exclusive of defense facilities of $117,162,256. About 78 percent of this is invested in facilities of the canal activity and the remaining 22 percent in facilities of all other activities. This relationship has been approximately the same for the past 3 years.

(c) Most of the administrative and other general expenses were allocated on a direction-of-effort basis; the remainder was charged directly to the applicable activity. The direction-of-effort basis was used by the Company in 1953 for statistical purposes and seems reasonable. It results in an allocation of approximately 25 percent to the canal activity.

[fol. 21] At page 17 hereof the table is more fully quoted and at page 18 are quoted certain GAO comments thereon, including the following:

> "Based on the financial results of the canal activity for the past three years, toll rates would have to be reduced substantially if hearings were held at this time" (Exhibit A, p. 2).

Material Facts Relied on Evidence by Official Publications

4. The foregoing quotations from Public Law 841 and the GAO audit report for 1954 can, however, best be understood by a presentation of their background and setting. Apart from the affidavits of their officers showing plaintiffs' status as corporations of States of the United States and as users of the Panama Canal, the evidence on plaintiffs' motion is derived almost entirely from official publications of the United States and other matters of judicial notice. Cf. Rule 44; *United States* v. *Aluminum Company of America*, 1 F. R. D. 71, 75 (S. D. N. Y.). Such evidence could be presented to the Court by simple annexation to the moving papers. However such presentation would impede compre-sion of the facts and plaintiffs' theory. In the interests of simplification, this narrative affidavit, setting forth quotations from, and identifying, the official publications relied on, is intended to correspond primarily to the remarks of counsel at a trial in proving a case by official publications.

I have been a member of the bar since 1926 and have been twice employed by the United States Department of Justice and once by the United States Department of Commerce. My practice has involved continual work with official publications of the United States Government. All books, reports and documents herein referred to as official publications purport to be such, and I so recognize and identify them.

[fol. 22] With respect to those judicially noticeable facts and provisions of law which are in official publications readily available to judges and attorneys, such as the statutes of the United States, I shall only quote the relevant language. With respect to those in official publications not thus readily available, the publications themselves are annexed to the affidavit as exhibits.

Defendant Created in 1948 as Panama Railroad Company to Operate Various Business Properties

5. The defendant was created by Public Law 808 of the 80th Congress, hereinafter referred to as Public Law 808, officially published at Volume 62, pages 1075-1080 of the United States Statutes at Large under the name of the Panama Railroad Company.* Public Law 808, by Section 2, enacted Article 3, Section 245 of the Canal Zone Code, as follows:

> "SEC. 2. Chapter 12 of title 2 of the Canal Zone Code, approved June 19, 1934 (48 Stat. 1122), is amended by adding at the end of said chapter a new article numbered 3, * * * and reading as follows:
>
> "'ARTICLE 3—PANAMA RAILROAD COMPANY ACT
>
> "'245. *Creation, Purpose, Offices, and Residence of Panama Railroad Company.*—For the purpose of conducting business operations incident to the care, maintenance, sanitation, operation, improvement, government, and protection of the Panama Canal and the Canal Zone, there is hereby created, as an agency and instrumentality of the United States, and as an adjunct of the Panama Canal, a body corporate to be known as the Panama Railroad Company, hereinafter referred to as the "corporation". The principal offices of the corporation shall be in the city of New York, New York, and in the Canal Zone, but the corporation [fol. 23] may establish agencies or branch offices in such other place or places as it may deem necessary or appropriate in the conduct of its business. Within the meaning of the laws of the United States relating to venue in civil actions, the corporation shall be deemed to be an inhabitant and resident both of the southern judicial district of New York and of the Canal Zone.'"

---

*The common form of citation "Stat." preceded by a volume number and followed by one or more page numbers will be used hereinafter to refer to the United States Statutes at Large. All volumes so referred to have been officially published.

Public Law 808, Section 2, further provided for the transfer to the Panama Railroad Company of the assets of a corporation of New York of the same name, by enactment of Section 246(a), as follows:

> "246. *Investment of the United States.*—(a) As of the beginning of business July 1, 1948, the corporation shall issue to the United States, and deliver to the Secretary of the Treasury, a receipt for $1 acknowledging the transfer to the corporation, under the provisions of section 251 of this title, of the net assets of the Panama Railroad Company, hereinafter referred to as the 'New York company', a corporation created by an act of the Legislature of the State of New York passed on April 7, 1849, as amended by an act of that legislature passed on April 12, 1855, and which is wholly owned by the United States, and such receipt shall be evidence of the ownership of the corporation by the United States of America. In its capacity as owner of the corporation, the United States shall be represented by the President of the United States or such officer of the United States as may be designated by him, hereinafter referred to as the 'stockholder'."

The background and purpose of these provisions of Public Law 808 were explained in House Report No. 2396, 80th Congress, 2d Session, as follows:

> "The broad purpose of the bill (S. 2747) are to fulfill, through incorporation of the Panama Railroad Company by act of Congress, this requirement of the Government Corporation Control Act, and to provide a charter appropriate and adequate for the efficient and successful performance of the role assigned to the company.
>
> [fol. 24] "The company was incorporated by an act passed by the legislature of the State of New York, April 7, 1849. It operated under private control until 1881, when the original French Canal Co. acquired most of the 70,000 shares of its stock. This company and its successor, the New Panama Canal Co., continued to operate the railroad as a common carrier and also as an adjunct in their attempts to construct a canal. In

1904 their shares of stock in the Panama Railroad Co. (68,888 share) passed to the ownership of the United States as a part of the assets of the New Panama Canal Co., which were purchased for the sum of $40,000,000, as authorized by the Spooner Act of June 28, 1902 (34 Stat. 481). The remaining 1,112 shares were purchased from private owners in 1905.

"The company, which is an adjunct of the Panama Canal, operates the railroad across the Isthmus of Panama, which, although traversing the Canal Zone, has its freight and passenger terminals in the cities of Colon and Panama in the Republic of Panama. It also operates a steamship line between New York and the Isthmus, the docks and harbor terminals on the Isthmus, coaling plants for ships, commissary stores supplying employees and ships, dry and cold storage plants for supplies, two hotels, and the telephone system for the Canal Zone; all of a purely commercial character essential to the operation of the Canal, and the maintenance of employees required in the conduct of the Canal enterprise.

"Section 5 of title 2, Canal Zone Code (48 U. S. Code, sec. 1305) authorizes the President to govern and operate the Panama Canal and govern the Canal Zone through the Governor of the Panama Canal. Sections 51 and 52 of title 2 of the code authorizes the President to operate, through the Panama Canal or the Company, various business operations connected with the Canal.

"The policy of the United States, since the acquisition of the Panama Railroad Company in 1904, has been to make the company an adjunct, first to the construction of the Canal, and thereafter to the maintenance, operation, sanitation, government, and protection of the Panama Canal and the Canal Zone. The [fol. 25] company also performs subsidiary but important functions as a service organization for the Army, Navy, and other Government organizations, and as a transportation facility serving the needs of the Republic of Panama and the Canal Zone."

(An official publication of House Report No. 2396 is annexed hereto, marked "Exhibit B.")

It will thus be seen that defendant was originally created as the Panama Railroad Company to conduct certain business operations incident to the needs of the Panama Canal, the Canal Zone Government, and the Republic of Panama, such operations having been previously conducted by a New York corporation of the same name, the stock in which had been acquired by the Government in 1904 and 1905.

Properties Transferred Pursuant to the Act of August 12, 1949

6. The Act of August 12, 1949, by Section 2, enacted Sections 51 and 52, Title 2, of the Canal Zone Code, officially published at 63 Stat. 600-602.

Section 51(a) authorized the President to "establish, maintain and operate, through the Panama Railroad Company, or otherwise, docks, wharves, piers, drydocks," and similar properties.

Section 51(b) provided, in part, as follows:

> "(b) In the event the President has heretofore elected, or shall at any time hereafter elect, to maintain and operate through the Panama Railroad Company any of the facilities and appurtenances referred to in this section or section 52 of this title, theretofore maintained and operated by the Panama Canal, the President is authorized to transfer to the Panama Railroad Company all or as much as may be determined to be necessary * * *."

[fol. 26] Section 52 provided, in part, as follows:

> "The President may cause any or all of the facilities and appurtenances referred to in paragraph (a) or (b) of Section 51 of this title to be organized and conducted by the Panama Canal as 'business operations' * * *."

The apparent intent of Section 52 was to permit the President to authorize The Panama Canal to organize such operations in the first instance, but subsequently to transfer operations so organized to the defendant, then named the Panama Railroad Company.

Pursuant to the authority so conferred the President on January 31, 1950 issued Executive Order No. 10102, officially published at 15 Federal Register, 595. Executive Order No. 10102 provides, in part, as follows:

> "By virtue of the authority vested in me by section 51 of title 2 of the Canal Zone Code, as amended by section 2 of the act of August 12, 1949, 63 Stat. 600 (Public Law 223, 81st Congress), it is ordered as follows:
>
> "Section 1. The following-described buildings in the Canal Zone, now owned by The Panama Canal but utilized by the Panama Railroad Company in its commissary and harbor-terminals operations, are hereby transferred to the Panama Railroad Company:
>
> "(a) Commissary Annex, Ancon.
> "(b) Commissary, Madden Dam.
> "(c) Commissary, Diablo Heights.
> "(d) Combination Storehouse, Cristobal.
>
> "Sec. 2. The following-described docks and piers in the Canal Zone, now owned by The Panama Canal but operated by the Panama Railroad Company, are hereby transferred to the Panama Railroad Company:
>
> "(a) At the Atlantic terminal: Piers Nos. 6 and 16, and Mindi Dock.
> "(b) At the Pacific terminal. Docks Nos. 6 and 7, and Pier 18."

[fol. 27] (Then followed eight additional sections listing various properties; the order continued:)

> "Sec. 11. The foregoing provisions of this order shall take effect on July 1, 1950, except that section 5 and section 9 so far as it relates to section 5 shall become effective on February 1, 1950."

Operation of Canal Prior to Public Law 841

7. Prior to July 1, 1951 the Panama Canal was operated by a Governor appointed by the President pursuant to Section 4 of the Act of August 24, 1912, 37 Stat. 561, providing in part as follows:

> "The President is authorized to govern and operate the Panama Canal and govern the Panama Canal, or

cause them to be governed and operated, through a governor of the Panama Canal and such other persons as he may deem competent to discharge the various duties connected with the care, maintenance, sanitation, operation, government and protection of the canal and the Canal Zone."

Studies and Reports Leading to Enactment of Public Law 841

8. Public Law 841 authorized the transfer of the Panama Canal to the defendant. The enactment of Public Law 841 was preceded by a study by the Bureau of the Budget, transmitted by the President to the Speaker of the House of Representatives on January 31, 1950. An official publication of the study and the letter of transmittal constituting Document No. 460, House of Representatives, 81st Congress, 2d Session, is annexed hereto, marked "Exhibit C".

Subsequently H.R. 8677 was introduced in Congress, embodying many of the suggestions of this study.

The Senate Committee on Armed Services conducted a hearing and made a report on H.R. 8677. Official publica-
[fol. 28] tions of this hearing, held September 1, 1950, and of this report, Senate Report No. 2531, 81st Congress, 2d Session, are annexed hereto, together constituting a single exhibit, marked "Exhibit D".

These publications are helpful in the construction of Public Law 841 and will, or may, be quoted in the brief to be submitted by plaintiffs on the argument of this motion.

Public Law 841 Authorizes the Transfer of the Canal to Defendant and Sets Forth a Tolls Formula

9. Public Law 841, Section 2(a)(2), changed the name of defendant to "Panama Canal Company."

Public Law 841, Section 10, by the enactment of Section 256 of the Canal Zone Code, authorized the President to transfer the Panama Canal to defendant, as follows:

"256. Authorization for Transfer of Panama Canal to Corporation. The President is hereby authorized to transfer to the corporation the Panama Canal, to-

gether with the facilities and appurtenances related thereto, and any or all of the facilities and appurtenances heretofore maintained and operated by the Panama Canal under authority of section 51 of title 2 of the Canal Zone Code, as amended by section 2 of the Act of August 12, 1949 (ch. 422, 63 Stat. 601), and all or so much as he may determine to be necessary of the personnel, property, records, related assets, contracts, obligations, and liabilities of or appertaining to the said Canal and the aforesaid facilities or appurtenances, and such transfer shall be deemed to have been accepted and assumed by the corporation without the necessity of any act or acts on the part of the corporation except as otherwise stipulated in the provisions of section 246 of this title."

Public Law 841, Section 11, authorized the defendant to prescribe tolls.

[fol. 29] Public Law 841, Section 12, by the enactment of Section 412(b) of the Canal Zone Code, quoted *supra*, Section 3 hereof, provided for the prescription of tolls as follows:

"(b) Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including interest and depreciation, and an appropriate share of the net costs of operation of the ageney known as the Canal Zone Government. In the determination of such appropriate share, substantial weight shall be given to the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government."

As there may be question raised as to the meaning of the reference "facilities and appurtenances related thereto" appearing in Section 12 of Public Law 841, emphasis should be given to the use of the same phrase in Section 10. It is submitted that under applicable rules of statutory con-

struction the phrase has the same meaning in both sections of the same statute.

It is also clear that the phrase cannot refer to the so-called business operations of which defendant was already in possession, and of which it or its predecessor of the same name had been in possession for many years prior to Public Law 841; hence Congress cannot have intended to authorize the transfer of such "business operations" by Public Law 841.

The President Transfers the Canal to Defendant

10. Pursuant to Public Law 841, Section 10, the President, by Executive Order No. 10623, officially published at 16 Federal Register, 6333, 6336, transferred the Panama Canal "together with all the facilities, buildings, structures, and improvements related thereto", as follows:

> [fol. 30] "Section 1. There are hereby transferred to the Panama Railroad Company, a corporate agency and instrumentality of the United States which upon the effective date of this order shall, pursuant to the said act of September 26, 1950, be known as the Panama Canal Company, (a) the Panama Canal (the waterway), together with all the facilities, buildings, structures, and improvements related thereto, and (b) all other facilities, buildings, structures, and improvements whatsoever now maintained and operated by The Panama Canal, an independent agency of the United States which upon the effective date of this order shall, pursuant to the said act of September 26, 1950, be known as the Canal Zone Government: *Provided, however*, that there are excepted from such transfer the following-described facilities, buildings, structures, and improvements, situated on the Isthmus of Panama, which shall be for use and administration by the agency which upon the effective date of this order shall, pursuant to the said act of September 26, 1950, be known as the Canal Zone Government.
>
> . . . . .

"SEC. 8. This order shall become effective on July 1, 1951."

The related business operations, already being in defendant's possession, necessarily were not included within the transfer effected by Executive Order No. 10623.

Defendant Reports Canal Income, But Fails to Give Data Showing the Application of the Tolls Formula

11. Pursuant to Executive Order No. 10623 defendant took over the maintenance and operation of the Panama Canal, together with facilities and appurtenances related thereto, on July 1, 1951 (Exhibit A, p. 3; Exhibit E, p. 2). Official publications of defendant's annual reports for the fiscal years ended June 30, 1952, 1953 and 1954 are annexed hereto, marked "Exhibit E", "Exhibit F", and "Exhibit G", respectively.

Of special relevance are the income statements in each of these reports.

[fol. 31]

For the year 1952 the income statement appears on page 41 of Exhibit E as follows:

TABLE 3.—INCOME STATEMENT, YEAR ENDED JUNE 30, 1952

	Total	Canal activities	Commercial activities	Employees service activities	Other service activities
REVENUE AND INTRACOMPANY CREDITS:					
Canal tolls	$26,995,771	$26,995,771	.....	.....	.....
Credit for tolls on U. S. Government vessels	3,413,728	3,413,728	.....	.....	.....
Sales of commodities	25,312,769	.....	$ 133,454	$22,366,382	$ 2,812,933
Sales and services	21,912,929	2,347,861	9,438,069	2,842,359	7,284,640
Revenue from housing activities	2,135,871	.....	.....	2,135,871	.....
Services and sales to Canal Zone Government and intracompany credits	20,279,420	227,226	3,089,477	3,191,056	13,771,661
Total	100,050,488	32,984,586	12,661,000	30,535,668	23,869,234
OPERATING EXPENSES:					
Direct expenses	51,406,991	12,947,837	10,789,086	8,295,727	19,374,341
Cost of goods sold and transferred	22,109,809	.....	131,337	19,954,459	2,024,013
Allowances for depreciation	4,842,140	4,908,319	920,829	970,040	1,042,952
Annuity to Republic of Panama	430,000	430,000	.....	.....	.....
General and administrative expenses, net of revenue $83,293 and exclusive of $529,012 allocated to the Canal Zone Government	2,772,364	697,767	355,702	685,353	1,033,542
Total	81,561,304	15,983,923	12,196,954	29,305,579	23,471,848
OPERATING INCOME	18,489,184	17,000,663	464,016	630,089	394,386

[fol. 32]

TABLE 3.—INCOME STATEMENT, YEAR ENDED JUNE 30, 1952—Continued

GENERAL CORPORATE CHARGES (NET):	
Net cost of operation of Canal Zone Government	9,608,299
Maintenance of defense facilities	102,684
Loss on disposal of facilities made surplus by consolidation	46,381
Interest income	−263
Total	9,757,101
NET INCOME BEFORE INTEREST	8,732,083
INTEREST PAYABLE TO U. S. TREASURY	6,363,053
NET INCOME FOR YEAR (table 2)	2,369,030

NOTES

1. Material qualifications as to the tentative nature of this statement appear on pp. 33 and 34.
2. Intracompany credits, amounting to approximately $18,000,000, represent "revenue" arising from interactivity service charges. The charges are included in operating expenses except those representing cost transfers to construction in progress and inventories.

[fol. 33]

For the year 1953 the income statement appears on page 49 of Exhibit F, as follows:

TABLE 3.—INCOME STATEMENT, YEAR ENDED JUNE 30, 1953

	Total	Canal and related marine operations	Auxiliary operations	Employee services	Other supporting services
REVENUE:					
Canal tolls	$31,973,209	$31,973,209	.....	.....	.....
Credit for tolls on U. S. Government vessels	5,557,682	5,557,682	.....	.....	.....
Sales of commodities	25,972,408	.....	$ 59,647	$22,811,773	$ 3,100,988
Sales of services	22,992,888	2,507,863	10,373,067	3,060,958	7,051,000
Rental of quarters	2,157,581	.....	.....	2,157,581	.....
Total revenue	88,653,768	40,038,754	10,432,714	28,030,312	10,151,988
OPERATING EXPENSES:					
Direct expenses, including intra-Company cost transfers	50,976,039	12,426,502	11,510,368	9,102,826	17,936,343
Cost of goods sold and transferred	22,167,495	.....	50,568	19,724,962	2,391,965
Allowances for depreciation	4,719,964	1,846,569	935,557	856,301	1,081,537
General and administrative expenses, net of $81,705 revenue and of $585,421 allocated to Canal Zone Government	2,745,327	660,932	440,571	672,079	971,745
Accrual for overhauls of Canal locks	962,962	962,962	.....	.....	.....
Annuity to Republic of Panama	430,000	430,000	.....	.....	.....
Net proceeds from fixed assets retired	(104,266)	(70,462)	.....	(23,633)	(10,171)
Net book value of fixed assets retired	18,468	.....	347	7,447	10,674
	18,915,989	16,256,503	12,937,411	30,339,982	22,382,093

[fol. 34]

TABLE 3.—INCOME STATEMENT, YEAR ENDED JUNE 30, 1953—Continued

	Total	Canal and related marine operations	Auxiliary operations	Employee services	Other supporting services
REVENUE:					
Less intra-Company cost distributions and sales and services to Canal Zone Government	18,803,948	216,125	2,936,006	2,802,095	12,849,722
Net operating expenses	63,112,041	16,040,378	10,001,405	27,537,887	9,532,371
OPERATING INCOME	25,541,727	23,998,376	431,309	492,425	619,617
		(Table 4)	(Table 5)	(Table 6)	(Table 7)
GENERAL CORPORATE CHARGES, NET:					
Net cost of Canal Zone Government (including abandoned capital projects written off, $1,139,273)	11,319,656				
Abandoned capital projects of the Company written off	269,703				
Maintenance of idle defense facilities	140,742				
Nonoperating credits and miscellaneous income	(58,232)				
Total	11,671,869				
NET INCOME BEFORE INTEREST	13,869,858				
INTEREST PAYABLE TO U. S. TREASURY	6,668,895				
NET INCOME FOR YEAR AS TENTATIVELY STATED (note 1 and table 2)	7,200,963				

The notes on pages 50 to 51 are an integral part of this statement.

[fol. 35]

For the year 1954 the income statement appears on page 47 of Exhibit G, as follows:

TABLE 3.—INCOME STATEMENT, YEAR ENDED JUNE 30, 1954

	Total	Canal and other marine operations (table 4)	Allied maritime operations (table 5)	Supporting service operations (table 6)
REVENUE:				
Canal tolls	$33,302,149	$33,302,149	.....	.....
Credit for tolls on U. S. Government vessels	3,888,957	3,888,957	.....	.....
Sales of commodities	26,136,169	.....	.....	$26,136,169
Sales of services	20,643,557	2,874,650	$ 6,532,620	11,236,287
Rental of quarters	2,424,345	.....	.....	2,424,345
Total revenue	86,395,177	40,065,756	6,532,620	39,796,801
OPERATING EXPENSES:				
Direct expenses including cost transfers	48,700,739	14,326,406	6,464,846	27,909,487
Cost of commodities sold and transferred	22,002,671	.....	.....	22,002,671
Allowance for depreciation	4,610,744	1,777,491	479,325	2,353,928
Total operating expenses	75,314,154	16,103,897	6,944,171	52,266,086
Less costs transferred to other activities	17,250,035	301,982	1,929,571	15,018,482
Net operating expenses	58,064,119	15,801,915	5,014,600	37,247,604
OPERATING INCOME	28,331,058	24,263,841	1,518,020	2,549,197

[fol. 36]

TABLE 3.—INCOME STATEMENT, YEAR ENDED JUNE 30, 1954—Continued

GENERAL CORPORATE EXPENSE:	
Net cost of Canal Zone Government (table 3—Canal Zone Government)	10,366,079
Interest payable to U. S. Treasury (tentative)	8,847,255
Administrative and other general expenses (table 7)	4,957,714
Total	24,171,048
NET INCOME, AS TENTATIVELY STATED (table 2)	4,160,010

The accompanying "Notes Pertaining to the Financial Statements" are an integral part of this statement.

[fol. 37] (It will be observed that each of these statements refers to qualifying notes. I have examined these notes and have found that they do not apply to the comments hereinafter following as to the absence of allocations.)

A conspicuous feature of each of these income statements is the omission of any allocation either of interest or of the cost of the Canal Zone Government as between defendant's Canal operation and its other operations. In the 1954 statement defendant also omitted allocation of general and administrative expenses, although such allocation appears in the 1952 and 1953 statements.

Defendant thus in each annual report failed to show the costs of operation which the rate of tolls should be "calculated to cover" according to Section 12 of Public Law 841 (Section 412[b] of the Canal Zone Code).

In its 1954 audit report the GAO calculated what would cover the costs listed in Section 12, and showed excess revenues of $27,836,504.

12. No such showing appeared in any official publication until the GAO audit report for 1954. In this report the following table appeared at page 13 (Exhibit A hereto, already partially quoted in section 4 hereof):

[fol. 38]

	1954			Three years ended June 30, 1954		
	Canal activity	Business activities	Total	Canal activity	Business activities	Total
Revenue	$40,065,756	$46,329,421	$86,395,177	$112,861,870	$141,958,379	$254,820,249
Operating expenses, including adjustments in 1954 to prior years' retained income	15,801,915	42,262,204	58,064,119	44,436,726	129,556,812	173,993,538
Operating income	24,263,841	4,067,217	28,331,058	68,425,144	12,401,567	80,826,711
General corporate expense (allocated by General Accounting Office):						
Net cost of Canal Zone Government (note a)	6,737,951	3,628,128	10,366,079	19,153,898	12,140,136	31,294,034
Interest payable to U. S. Treasury (note b)	6,869,894	1,977,361	8,847,255	18,518,673	5,439,180	23,957,853
Administrative and other general expenses (note c)	1,125,351	3,832,363	4,957,714	2,916,069	9,630,222	12,546,291
	14,733,196	9,437,852	24,171,048	40,588,640	27,209,538	67,798,178
Net income (−loss)	$ 9,530,645	−$5,370,635	$ 4,160,010	$ 27,836,504	−$14,807,971	$ 13,028,533

(a) Net costs of Canal Zone Government are allocated on the revenue ratio defined in section 412(b) of the Canal Zone Code. This results in an allocation of 65 percent of these costs to the canal activity for 1954, 63 percent for 1953, and 55 percent for 1952. If the allocation were to be made on the basis of gross investment in fixed properties (see recommendation to the Congress, p. 9), about 78 percent of the costs would have been allocated to the canal activity.

(b) Interest for the fiscal years 1952, 1953, and 1954 is computed at 1.95, 2.05, and 2.342 percent, respectively, on $377,764,946, the net direct investment of the Government in the Company. Comments on interest expense are contained on page 19.

The capital base, that is, the gross investment in fixed properties, at June 30, 1954, used for allocating interest to all activities is $587,829,356 exclusive of defense facilities of $117,162,256. About 78 percent of this is invested in facilities of the canal activity and the remaining 22 percent in facilities of all other activities. This relationship has been approximately the same for the past 3 years.

(c) Most of the administrative and other general expenses were allocated on a direction-of-effort basis; the remainder was charged directly to the applicable activity. The direction-of-effort basis was used by the Company in 1953 for statistical purposes and seems reasonable. It results in an allocation of approximately 25 percent to the canal activity.

[fol. 39] So far as I am aware, neither the GAO nor defendant has officially published a calculation of the Canal operations for fiscal 1951 and 1952, giving effect to the allocations determined to be applicable by GAO in footnotes (a) and (b) of the foregoing table.*

The rates of tolls in effect July 1, to June 30, 1954, have thus been authoritatively "calculated" not only to "cover" the statutory costs but to exceed them by $27,836,504, which comes to about 26½% of tolls and toll credits, or about 24¢ a ton. Not only is this calculation [fol. 40] evidence of such excess collection of tolls, but also, for the reasons to be presented in the brief which will be submitted on the argument of the motion, the calculation is binding on defendant.

In addition to its footnotes the following comments by the GAO in the 1954 audit report are relevant to an under-

---

*The following table is an attempt to calculate the results for 1951 and 1952 on the basis of published figures:

CANAL OPERATIONS

	1952	1953
Operating income (from Exhibit E, p. 41, and Exhibit F, p. 49, adjusted for changed accounting treatment of channel improvements, depreciation, etc., and locks overhaul, Exhibit A, pp. 18, 19–20, 35–36, Exhibit F, p. 48)	$18,698,817	$23,810,876
Corporate charges:		
Net costs of operation of Canal Zone Government (a)	$ 5,284,564	$ 7,131,383
Interest payable to U. S. Treasury (b)	5,745,805	6,040,461
	$11,030,369	$13,171,844
Net income	$ 7,668,448	$10,639,032

(a) That is, 55% of $9,608,299 for 1952 (Exhibit E, p. 41) and 63% of $11,319,656 for 1953 (Exhibit F, p. 49).

(b) That is, 78% of $7,366,417 for 1952 and of $7,744,181 for 1953 (Exhibit A, pp. 19–20, 35–36, representing adjustments of figures shown in Exhibit E, p. 41, and Exhibit F, p. 49).

Channel improvements had long been treated as current expense. In 1954 defendant reclassified these entries as capital investment. This and other accounting reclassifications substantially increased interest charges but resulted in the elimination of certain current expense, and thereby increased income before interest. Recital herein of these accounting adjustments and other accounting statements by defendant and GAO is not intended to preclude plaintiffs from challenging any accounting entry not made according to law.

standing of the table heretofore quoted (Exhibit A, pp. 2-3):

"1. The legislative hearings and reports of congressional committees preceding the reorganization indicate the intention that the Company would be self-sustaining and the canal and business activities would each bear its own costs of operation, including interest, depreciation, and an appropriate share of the net cost of Canal Zone Government. History reflects the general feeling that tolls would have to be increased to $1 or more a ton.

The Company has had 3 years' operating experience under the Federal charter (2 Canal Zone Code 245 to 258, inclusive), as amended by the act of September 26, 1950 (64 Stat. 1038). The Company, as a whole, has been self-sustaining. However, the Company did not have available for our examination an analysis to determine the financial results by activities. We have prepared such an analysis by allocating general corporate expenses (interest, net cost of Canal Zone Government, and administrative and other general expenses) to the activity operating results reported by the Company. Also, the analysis shows the application of the adjustments proposed by our recommendations.

The analysis of the Company's reported net income of $13,000,000 for the 3 years since the reorganization shows that, contrary to the apparent expectation of the Congress, the canal activity had a net income of $28,000,000 and business activities had losses of $15,000,000. The term 'business activities' as used in this report includes all commercial and service activities, except the canal activity. Income from the canal activity and losses from the business activities were substantial in each year. (See further comments pp. 11 to 16.)

[fol. 41] Further, the analysis shows that if full amortization and interest costs are considered, the net income for the 3 years would be reported as $7,000,000, representing income of $22,000,000 from the canal activity and losses of $15,000,000 from the business activities. Thus the net income from the canal activity is being used to offset losses from business activities.

Section 255 of the Canal Zone Code authorizes appropriations for company-wide losses but does not authorize appropriations for losses from individual activities. We interpret the legislation as precluding any losses sustained by the Panama Canal Company in the operation and maintenance of business facilities being included in the basis for determining tolls under section 412 (b). Based on the financial results of the canal activity for the past 3 years, toll rates would have to be reduced substantially if hearings were held at this time. (See recommendation to Cong., p. 8.)

A decline in tolls revenue of about 10 percent arising from reduced rates or a lower volume of traffic without a corresponding reduction in losses from business activities would make it necessary for the Company to request appropriations to cover companywide losses. (Comments on factors affecting future operations appear on pp. 21 to 25.)"

And the following (from Exhibit A, p. 15):

"The Company's practice of establishing relatively low prices for commodities and services has resulted in fringe benefits to Canal organization employees and contributed to the losses sustained by business activities. Generally, sales of commodities and services to employees have been considered as transactions within the Canal organization, and, as such, the prices charged have not included all elements of Canal Zone Government costs and other general corporate expenses. In December, 1953 the Governor and the comptroller prepared a pricing policy statement for submission to the board of directors. Basically the policy conformed to the Company's practice for the past 2 years. However, the statement was not officially presented to the board because the Company's general counsel stated [fol. 42] that in his opinion the policy was not in accord with the intent and purposes of the basic legislation. We concur in the opinion of the general counsel that, insofar as transactions with the Company are concerned, employees have the same status as other customers.

> As of December 10, 1954, no further action had been taken by the management or board of directors to formalize the existing pricing policy."

13. As shown by official publications, defendant has never prescribed rates of toll.

Public Law 841, Section 11, provides that the rates of toll prevailing on its effective date shall continue in effect until changed as therein provided. Section 11 further provides that notice of any proposed change shall be published in the Federal Register. I have examined the volumes of the Federal Register containing notices published subsequent to July 1, 1951 and find no reference to any proposed change in Panama Canal tolls. It is evident from the GAO audit report that any prescription of tolls according to law would necessarily result in a change of rate.

Rates of toll were prescribed by the President by Proclamation No. 2247 of August 25, 1937, amended by Proclamation No. 2249 of August 31, 1937, officially published at Federal Register, Year 1937, Volume 2, Part 2, pages 1764-1774, 1796. These proclamations show that the rates therein provided are those in effect during 1954 as reported by defendant on page 2 of Exhibit F.

Said rates are (quoting from Exhibit F, p. 2):

> "(a) On merchant vessels, Army and Navy transports, colliers, tankers, hospital ships, supply ships, and yachts, when carrying passengers or cargo—ninety (90) cents per vessel-ton of 100 cubic feet of actual earning capacity—that is, the net tonnage determined in accordance with the Rules for the Measurment of Vessels for the Panama Canal;
> [fol. 43] (b) On vessels in ballast, without passengers or cargo—seventy-two (72) cents per vessel-ton;
> (c) On other floating craft—fifty (50) cents per ton of displacement."

Reference is also made to that sentence in the GAO audit report for 1954 quoted *supra* page 19: "However, the Company did not have available for our examination an analysis to determine the financial results by activities."

As the prescription of tolls would necessarily involve the financial results of the Canal activity as such, defend-

ant would presumably have had these results available for GAO examination if it had ever prescribed tolls.

Status of the Government Credits

14. Each of the annual income statements quoted in Section 11 hereof contains a revenue item entitled "Credit for Tolls on U. S. Government Vessels." These credits are presumably responsive to Section 12 of Public Law 841 enacting Section 412(c) of the Canal Zone Code, as follows:

> "(c) Vessels operated by the United States, including warships, naval tenders, colliers, tankers, transports, hospital ships, and other vessels owned or chartered by the United States for transporting troops or supplies, may in the discretion of the President of the United States be required to pay tolls. In the event, however, that such vessels are not required to pay tolls, the tolls thereon shall nevertheless be computed and the amounts thereof shall be treated as revenues of the Panama Canal Company for the purpose of prescribing the rates of tolls, and shall be offset against the obligations of the said corporation under paragraphs (c) and (e) of section 246 of this title, as amended."

I do not personally know whether or not the credit items in the annual statements refer to inter-agency credits from the Government agencies operating vessels transiting the Panama Canal, arranged through the Treasurer of the United States, or whether these items are only computa- [fol. 44] tions reflecting transits but not actual revenues either by way of money payments or inter-agency credits. I am informed that the latter is the case. Accordingly the Government agencies whose ships transited the Canal would have suffered no damage. The $27,836,504 figure reached by the General Accounting Office is nevertheless helpful in indicating the proportion of overcharge in the current toll rate. Obviously its use is not intended to suggest that plaintiffs and other shipowners whose ships transit the Canal are entitled to recover for themselves any portion of the toll credits for Government transits. I assume that the actual collection and distribution of damages will be in accordance with the procedure approved by the

United States Court of Appeals for the Second Circuit in *York* v. *Guaranty Trust Co.*, 143 F. 2d 503, 529, and *Dickinson* v. *Burnham*, 197 F. 2d 973, and more particularly described in this Court's opinion in *Dickinson* v. *Burnham*, reported at 11 F. R. S. 489.

Reason for Order to Show Cause

15. The reason why application is made for an order to show cause is that, under the Rules, on an ordinary notice of motion, the opposing party may file his affidavits the day before the return day. In this case, because of its importance and scope, though lacking a genuine issue of material fact, plaintiffs may require more than a single day to prepare reply affidavits.

Further, plaintiffs will require the guidance of defendant's answering affidavits in the preparation of their brief to be submitted on the argument of the motion.

Accordingly, plaintiffs have provided by the proposed order to show cause for additional time in respect of both service of reply affidavits and the period between the service of affidavits and the hearing of the motion.

For the same reason plaintiffs propose time additional to that required by the Rules for defendant's service of answering affidavits.

[fol. 45] Explanation of Service Provisions

16. Defendant has not yet answered, nor has any attorney appeared for defendant. Accordingly it will be necessary to serve defendant itself. As defendant is a corporate agency of the United States, prior to the appearance of an attorney on its behalf plaintiffs propose to effect service of the motion papers in the manner provided by Rule 4 for service of a complaint, that is, by service upon defendant and upon the United States Attorney for this District, and by registered mail, upon the Attorney-General of the United States. However, it has been difficult for plaintiffs to locate copies of all the exhibits. Hence I request that the Court permit that the annexation of the exhibits be dispensed with in respect of the papers to be served on the defendant and the United States Attorney for this District.

The reason that the Attorney-General is selected to receive the sets of papers with exhibits is that I am informed

that the case is being handled by officers of the Department of Justice in Washington, D. C. This information was received by me by telephone on September 29, 1955, from Mr. E. Robert Seaver of the New York Field Office of the Department of Justice, Room 1206, United States Courthouse, New York. Further, the Office of Public Relations, Department of Justice, Washington, D. C., on October 18, 1955 confirmed to me by telephone a story appearing in the Canal Zone newspaper "Panama American" on September 28, 1955 as follows:

"Justice Department Will Defend Canal's $27,000,000 Damage Suit

Washington, Sept. 28 (UP). The Justice Department has decided to represent the Panama Canal Company in a $27,000,000 damage suit, a spokesman said today.

[fol. 46] The company was named in a suit filed in Federal court at New York Sept. 13 by 12 United States steamship companies that claim they have been overcharged by that amount in excessive tolls since 1951.

The Company is an independent government agency, but wrote the Justice Department 'for our opinion on the employment of outside counsel,' the spokesman said.

'In view of the wide public interest we advised them that they should be represented by the Attorney General.'

The spokesman said he could give no indication at this time when replies to the suit will be filed or what procedures will be followed."

In connection with this request it is to be noted that the exhibits are all official publications of the defendant and other agencies of the United States, or of its legislative branch, and having to do with defendant's affairs. Copies thereof are presumably readily available to defendant and its counsel.

17. No previous application has been made for the relief herein sought.

Wherefore, deponent asks that the annexed order to show cause be granted.

C. Dickerman Williams.

Sworn to before me this 26th day of October, 1955. Myrtle Crooks, Notary Public, State of New York. Qualified in New York County. No. 31-0807450. Cert. Filed with City Register, N. Y. Co. Commission Expires March 30, 1957.

[fol. 47] EXHIBIT "A" TO MOTION

84th Congress, 1st Session House Document No. 160

REPORT ON AUDIT OF PANAMA CANAL COMPANY AND THE CANAL ZONE GOVERNMENT FOR THE FISCAL YEAR ENDED JUNE 30, 1954

Letter from the Comptroller General of the United States Transmitting a Report on the Audit of the Panama Canal Company and Canal Zone Government for the Year Ended June 30, 1954, Pursuant to the Government Corporation Control Act (31 U. S. C. 841), the Budget and Accounting Act, 1921 (31 U. S. C. 53), and the Accounting and Auditing Act of 1950 (31 U. S. C. 67)

May 16, 1955.—Referred to the Committee on Government Operations and ordered to be printed

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[fol. 48] REPORT ON AUDIT OF PANAMA CANAL COMPANY AND CANAL ZONE GOVERNMENT FOR THE FISCAL YEAR ENDED JUNE 30, 1954

General Comments

The Division of Audits, General Accounting Office, has made an audit of the Panama Canal Company and the Canal Zone Government for the year ended June 30, 1954, pursuant to the Government Corporation Control Act (31 U. S. C. 841), the Budget and Accounting Act, 1921 (31 U. S. C. 53), and the Accounting and Auditing Act of 1950

(31 U. S. C. 67). Our audit work in the Canal Zone was completed on December 10, 1954; however, this report contains comments on the effect of significant actions taken subsequent to that date.

We are making two new recommendations to the Congress in this report: (1) that a specific plan for liquidating the investment of the United States Government in the Panama Canal Company be incorporated into the basic legislation and (2) that the formula for establishing toll rates be amended to include the recovery of losses sustained by the Company in the operation of business activities. (See p. 8.)

The recommendations to the Congress and the President of the United States made in our 1953 report (H. Doc. 473, 83d Cong.) are briefly restated on pages 9 to 14, as they are still applicable, except for those relating to consolidation of Canal Zone hospitals and interest on interest during construction. The status of recommendations made to the board of directors of the Company and the Governor of the Canal Zone in prior years is summarized in appendix B.

This report contains comments on certain operations of the Armed Services in the Canal Zone in order to present to the Congress a broad picture of the major Government activities in that area. Canal organization officials have no control over military activities, but the Canal organization activities are greatly affected by the presence of the Armed Services. Armed Services personnel and their dependents comprise about half of the total population, and a significant part of the land area is under military control. Thus military and Canal organization activities are closely interwoven and, in many cases, duplicated. Many key positions in the Canal organization are held by Army and Navy officers on normal tour of duty assignments.

The financial and operating data of the Panama Canal Company and the Canal Zone Government are presented as though they constituted a single organization, because the two entities are closely integrated in their administration and operation. We are unable to state that the accompanying financial statements (exhibits 1–7) present fairly the financial position of the Canal organization at June 30,

1954, or the result of operations for fiscal year 1954 for the following reasons:

1. About 75 percent, or $340,000,000, of the cost of construction and improvement of the Panama Canal has not been depreciated or amortized since 1914. (See p. 27.)
[fol. 49] 2. The inventory and appraisal of properties is still incomplete. (see p. 27.).
3. An undetermined amount of excess, slow-moving, and obsolete stock is included in inventories at cost. (See p. 27.)
The management expects to complete the inventory and appraisal in 1956. Any adjustments to property or inventory accounts will affect the net investment of the Government, annual interest charges, and the amount of indebtedness to the Treasury at June 30, 1954. Property adjustments will also involve changes of annual depreciation charges.

During 1954 the Company recorded substantial adjustments to the accounts for prior years, reclassified and regrouped some of the activity accounts, and changed the form of operating statements. Thus the statements presented in this report are not fully comparable with those presented in previous audit reports.

The following significant matters were observed during our audit:

1. The legislative hearings and reports of congressional committees preceding the reorganization indicate the intention that the Company would be self-sustaining and the canal and business activities would each bear its own costs of operation, including interest, depreciation, and an appropriate share of the net cost of Canal Zone Government. History reflects the general feeling that tolls would have to be increased to $1 or more a ton.

The Company has had 3 years' operating experience under the Federal charter (2 Canal Zone Code 245 to 258, inclusive), as amended by the act of September 26, 1950 (64 Stat. 1038). The Company, as a whole, has been self-sustaining. However, the Company did not have available for our examination an analysis to determine the financial results by activities. We have prepared such an analysis by allocating general corporate expenses (interest, net cost

of Canal Zone Government, and administrative and other general expenses) to the activity operating results reported by the Company. Also, the analysis shows the application of the adjustments proposed by our recommendations.

The analysis of the Company's reported net income of $13,000,000 for the 3 years since the reorganization shows that, contrary to the apparent expectation of the Congress, the canal activity had a net income of $28,000,000 and business activities had losses of $15,000,000. The term "business activities" as used in this report includes all commercial and service activities, except the canal activity. Income from the canal activity and losses from the business activities were substantial in each year. (See further comments pp. 11 to 16.)

Further, the analysis shows that if full amortization and interest costs are considered, the net income for the 3 years would be reported as $7,000,000, representing income of $22,000,000 from the canal activity and losses of $15,000,000 from the business activities. Thus the net income from the canal activity is being used to offset losses from business activities.

Section 255 of the Canal Zone Code authorizes appropriations for company-wide losses but does not authorize appropriations for losses from individual activities. We interpret the legislation as precluding any losses sustained by the Panama Canal Company in the operation and maintenance of business facilities being included in the basis for determining tolls under section 412 (b). Based on the [fol. 50] financial results of the canal activity for the past 3 years, toll rates would have to be reduced substantially if hearings were held at this time. (See recommendation to Cong., p. 3.)

A decline in tolls revenue of about 10 percent arising from reduced rates or a lower volume of traffic without a corresponding reduction in losses from business activities would make it necessary for the Company to request appropriations to cover companywide losses. (Comments on factors affecting future operations appear on pp. 21 to 25.)

2. There were no major consolidations or eliminations of duplicate activities and related facilities operated in the Canal Zone by Federal Government agencies, other than

hospitals. Details of the minor changes made over the past 2 years are shown on page 5.

In September 1954 hospital facilities of the Canal Zone Government and the Armed Services were consolidated and the number of hospitals in the Canal Zone reduced from four to two. This consolidation resulted from action on the part of the Congress (sec. 106, Civil Functions Appropriation Act, 1955). (See p. 6.)

Creation and Authority

The Panama Canal Company (known as Panama Railroad Company until 1951) was created in 1849 under the laws of the State of New York as a private corporation, acquired by the United States in 1905, and reincorporated under a Federal charter in 1948 pursuant to the requirements of the Government Corporation Control Act. It is the principal agency of the United States in the Canal Zone. It is responsible for the operation and maintenance of the canal and business activities and is authorized to use its revenues to finance its operating expenses and capital expenditures on a self-sustaining basis.

The Canal Zone Government (known as Panama Canal agency until 1951) was established in 1914. It is responsible in the Canal Zone for the various activities connected with civil government. The operating and capital expenditures are financed from funds appropriated annually by the Congress. Collections of school tuitions, hospital fees, and other fees and fines are required to be covered into the Treasury as miscellaneous receipts.

The Company is required to reimburse the Treasury for interest on the Government's net direct investment in the Company, the annuity paid to the Republic of Panama, and the net cost of operation of the Canal Zone Government, which is deemed to be an integral part of the cost of operation of the Panama Canal enterprise as a whole.

Effective July 1, 1951, the Canal Zone Government and the Company entered into an agreement whereby the Company provides certain essential services for the Canal Zone Government.

Management and Organization

The management of the Company is by law vested in its board of directors, consisting of between 9 and 13 members;

the management of the Canal Zone Government is vested in the Governor of the Canal Zone. Both organizations are subject to the supervision of the President of the United [fol. 51] States. This supervision has been delegated to the Secretary of the Army (formerly Secretary of War) since the United States undertook to construct the canal.

The Secretary of the Army has been designated by the President of the United States as sole stockholder of the Company. In this capacity, he appoints the members of the board of directors, except the Governor, and those appointed serve at his pleasure. (See appendix A for list of directors at June 30, 1954.)

The board of directors elect and fix the compensation of a vice president, a comptroller, and a secretary. They do not elect or fix the compensation of the president of the Company.

The Governor of the Canal Zone is appointed for a term of 4 years by the President of the United States, subject to Senate confirmation (2 Canal Zone Code 6), and receives an annual salary of $15,000. He is the administrative head of the Canal Zone Government, ex officio, a member of the board of directors of the Panama Canal Company, president of the Company, and its chief executive officer. Traditionally, the governors have been high ranking officers of the Corps of Engineers, United States Army, generally serving their last tour of active duty; and many of their subordinates, both in the Canal Zone Government and the Company, have been and continue to be officers of the Armed Services assigned by the military agencies for periods of 2, 3, or 4 years.

Many members of the board of directors have been or are closely associated with the Armed Services. The attendance at the 15 board meetings held since the reorganization in July 1951 ranged from 8 to 12 directors, and, except for one meeting, the majority of the directors were either officials, employees, or former officers of the Department of the Army. No board meetings were held in the Canal Zone between October 1952 and December 1954, although subcommittees of the board met in the Canal Zone during this period. On July 24, 1954, the Company's bylaws were amended to require at least one meeting each year in the Canal Zone.

No major organizational changes, other than those reported in our 1953 report, were made during fiscal year 1954. However, some changes were made which appear to have facilitated coordination of related activities, but did not contribute to the over-all reduction in force. The management staff in the office of the comptroller was abolished, and the duties, other than budgetary and fiscal duties, were transferred to a new executive planning staff in the office of the Governor-President. The motor transportation division was transferred from the supply and service bureau (renamed supply bureau) to the railroad and terminal bureau (renamed transportation and terminal bureau). The Tivoli Guest House was transferred from the supply and service bureau to the community services bureau.

[fol. 52] Recommendations to the Congress

New Recommendations

The following two new recommendations are made as a result of our 1954 audit.

1. Plan for liquidating investment of the United States Government

We recommend that the Canal Zone Code be amended to incorporate a plan for systematic refunding to the Treasury of the investment of the United States Government in the Panama Canal Company.

Under present legislation, the board of directors of the Company is required to appraise, at least annually, its necessary working capital requirements, together with reasonable foreseeable requirements for authorized plant replacement and expansion, and to pay into the Treasury as dividends the amount of funds in excess thereof (section 253, title 2, of the Canal Zone Code).

The Company has retained large amounts of cash on hand to finance long-term construction projects and for contingencies. The only capital returned to the Treasury by the Company since the reorganization in 1951 was $10,000,000 in November 1954. This return of capital resulted primarily from action taken by the Bureau of the Budget.

Because of the reluctance of the board of directors to cover into the Treasury cash in excess of immediate needs, we believe that a specific plan for reducing the Government's investment should be provided in the law. The plan should require the refundment annually of an amount at least equal to the depreciation and amortization for the year. This would make it necessary for the Company to obtain additional capital contributions from the Congress to finance authorized major plant replacement and expansion, as provided by section 246, title 2, of the Canal Zone Code.

The existing legislation provides that the Company reimburse the Treasury annually for the net cost of Canal Zone Government, including depreciation on properties. Thus, the investment of the United States Government in the Canal Zone Government is being liquidated in a systematic manner.

Other related recommendations to the Congress appear on pages 9 and 10.

2. Recovery of business activity losses through tolls

We recommend that paragraph (b) of section 412, title 2, of the Canal Zone Code, be amended to require that losses sustained by the Panama Canal Company in the operation of business activities be included in the basis for determining toll rates.

This recommendation is based on our belief that all losses of operating business activities necessary in support of the canal activity, directly or indirectly, should be recoverable through tolls. Such losses, however, should be [fol. 53] kept to an absolute minimum by efficient and economical business practices.

Comments on operating losses of the business activities are contained on pages 2 to 5, and 14 to 16.

Prior Recommendations

Our audit report for fiscal year 1953 contained 15 recommendations to the Congress for changes in basic legislation. The one relating to interest on interest during construction has been deleted. In view of the continuing interest of the congressional committees in the remaining recommendations, and our opinion that the recommended changes are still needed, they are repeated in summary

form. Complete details on each recommendation are contained on pages 16 to 31 of our 1953 audit report (H. Doc. 473, 83d Cong.).

1. Creation of a single independent agency

Combine the Panama Canal Company and the Canal Zone Government into a single independent entity with broad powers similar to those of the present Company.

2. Establishment of a single administrator or a small board

Establish a small full-time resident board or a single administrator to replace the present 13-man part-time board.

3. Transfer of emergency fund into United States Treasury as a dividend

Repeal section 254 of title 2, Canal Zone Code, which requires the Company to maintain an emergency fund of $10,000,000 in the United States Treasury and enact legislation requiring the Company to transfer the $10,000,000 into the Treasury as a dividend.

4. Depreciation of Canal construction costs

Amend paragraph (b) of section 412, title 2 of the Canal Zone Code, and require that prescribed toll rates be calculated to cover adequate provisions for depreciation or amortization of Canal construction costs (over the estimated useful life of the waterway from 1914, or from the date the asset was placed in service if later than 1914, but in no event to extend beyond 2014).

5. Payment of interest on the net investment in Canal Zone Government

Amend paragraph (c) of section 246, title 2 of the Canal Zone Code, to require the Company to pay interest on the net investment of the United States Government in the Canal Zone Government.

6. Changes in cost recovery formula

Amend paragraph (b) of section 412, title 2 of the Canal Zone Code, to include an allowance for contingencies in the costs to be recovered through tolls and to require, for toll rate purposes, the allocation of an appropriate share

of the net costs of Canal Zone Government to transiting activities on the basis of gross investment in fixed properties, if a formula is to be specified in the legislation. In this connection, see recommendation to the Congress on pricing policy, page 11.

[fol. 54] 7. Direct payments to the Canal organization by other Government agencies

Repeal that part of paragraph (c) of section 412, title 2 of the Canal Zone Code, which pertains to offsetting tolls on Government vessels against the Company's obligations payable into the Treasury and require, through enabling legislation and appropriations, that other Government agencies reimburse the Canal organization for tolls and the costs of any services rendered.

8. Uniform salary differentials and sick and annual leave privileges for Government employees

Make existing legislation and regulations pertaining to salary differentials and sick and annual leave applicable uniformly to all Government employees in the Canal Zone, and authorize a central agency to determine the salary differential to be paid to all Government employees in the Canal Zone.

9. Transfer of Canal Zone postal service to the Post Office Department

Transfer the Canal Zone postal service to the United States Post Office Department. The postal service is conducted, in general, in accordance with the laws, rules, rates, and regulations of the Post Office Department. This change would conform present operation of the postal service in the Canal Zone to that in territories and possessions of the United States.

10. Limitation on personal services for the Governor

Include a limitation in future appropriation acts on expenditures for the residence, furnishings, limousines, and personal services provided for the Governor.

11. Limitation on entertainment expenses

Provide for a single limitation on entertainment expenses of the Canal Zone Government and the Panama Canal Company in future appropriation acts.

12. Cash requirements for capital expansion

Amend section 253, title 2 of the Canal Zone Code, to require that determinations of excess cash to be paid into the Treasury by the Company be based on plant replacement and expansion needs for the ensuing year rather than on needs for long-term construction projects.

13. Payment of a dividend by the Company.

Require the Company to refund $15,000,000 to the Treasury, as warranted by the current position at June 30, 1953. Cash funds at June 30, 1954, were about $5,000,000 greater than at June 30, 1953. The Company paid $10,000,000 into the Treasury in November, 1954. We believe that the remaining $5,000,000 should be paid. After payment of this amount, the Company's cash funds would still be excessive to immediate needs. However, we make no recommendation for the further payment of a specific amount because of the uncertainty of the effect on cash requirements of (1) possible wage increases for U. S. rate employees, (2) provisions of the pending treaty with Panama, (3) free vacation travel benefits, (4) possible abandonment of the railroad, etc. (See p. 21.)

[fol. 55] 14. Pricing policy

Consider amending the Canal Zone Code to set forth principles to be followed in determining prices for commodities and services furnished by the Canal organization to its employees and other customers. (See p. 15.)

Prior Recommendations to the President of the United States

In our 1953 report we made three recommendations to the President of the United States. The one on utilization of hospitals in the Canal Zone has been adopted. (See p. 3.) The remaining two recommendations are still applicable.

1. Investigation of duplicate facilities

Have an investigation made of the duplication of facilities throughout the entire Canal Zone, including those operated by the Company, Canal Zone Government, the Armed Services, and other Government agencies, by persons not connected with the Canal organization or the Armed Services in the Canal Zone. (See p. 4.)

2. Services and materials furnished to the District Court and its employees without reimbursement

Rescind section 6 of Executive Order 7676, dated July 26, 1937, which requires the Canal organization to furnish quarters, utility services, office supplies and equipment, and transportation of court officials in the Canal Zone, including housing to three court officials, without charge. The Comptroller General, in decision B–121815 dated March 16, 1955, directed the Governor to take immediate steps to require the three district court officials to pay a reasonable rental for the quarters occupied by them.

Operations

The Company classified fiscal year 1954 operating results into the following categories: (1) canal and other marine operations, (2) allied maritime operations, and (3) supporting services. The Company made no allocations of general corporate expenses in the financial statements. These expenses include interest payable to the United States Treasury, net cost of Canal Zone Government, and administrative and other general expenses. Such allocations need not be recorded in the accounts but are necessary periodically to determine the adequacy of prices charged by each activity.

Details of the Company operating results and administrative and other general expenses, summarized in exhibit 4, are shown in schedules 1 through 4. Exhibit 7 shows the detail of Canal Zone Government operating results. A list of the main operating functions is shown in appendix C.

Results of Operations

Reported net income of the Company for fiscal year 1954 was $4,160,010, after deducting the net cost of Canal Zone Government of $10,366,079, interest of $8,847,255, and depreciation of $4,710,461. Reported net income as adjusted for the 2 years 1953 and 1952 was $8,868,523, making [fol. 56] a total of $13,028,533 for the 3 years since the July 1, 1951, reorganization.

Unrecorded and nonreimbursed costs

The Company generally follows the policy of reporting only those costs which, by law, are recoverable through tolls.

Therefore, the reported net income excludes the costs of amortizing the waterway and interest on the investment in Canal Zone Government. Conversely, operating expenses include nonreimbursed costs of performing services for other Government agencies in the Canal Zone. When these unrecorded net costs and nonreimbursed costs, as estimated by the General Accounting Office, are taken into account, the net income for fiscal year 1954 and for the 3 years ended June 30, 1954, is substantially the same as reported by the Company. (See p. 13.)

We believe that all costs, including those excluded from recovery through tolls, should be disclosed in the financial statements. When all cost information is available, toll rates can be calculated on any basis specified by law. Complete reporting of the results of operations, financial position, and the net investment of the Government would keep the Congress informed as to the costs not being recovered because of existing legislation, treaty agreements, or the inadequacy of toll and other rates. The Panama Canal is an international waterway. In 1954 almost 90 percent of the tolls revenue was derived from commercial vessels of United States and foreign registry. Under the circumstances the importance of reporting all costs and recovering them through tolls and other tariffs cannot be overemphasized, because losses incurred in the operation of the canal would represent subsidies by the Government to operators of commercial vessels, most of them foreign. (See recommendations to the Congress, pp. 9 and 10.)

Determination of operating results by activity and effect of General Accounting Office recommendations

In order to determine the adequacy of toll rates and prices charged by the Company for commodities and services, general corporate expenses must be allocated to the individual activities. We made allocations of interest, administrative and other general expenses, and the net costs of Canal Zone Government on the bases explained in the footnotes on page 13. A similar study was not made by the Company.

A summary of operating results for the year 1954 and for the 3-year period ended June 30, 1954, adjusted to reflect our recommendations concerning interest and depreciation, follows.

[fol. 57]

	1954			Three years ended June 30, 1954		
	Canal activity	Business activities	Total	Canal activity	Business activities	Total
Revenue	$40,065,756	$46,329,421	$86,395,177	$112,861,870	$141,958,379	$254,820,249
Operating expenses, including adjustments in 1954 to prior years' retained income	15,801,915	42,262,204	58,064,119	44,436,726	129,556,812	173,993,538
Operating income	24,263,841	4,067,217	28,331,058	68,425,144	12,401,567	80,826,711
General corporate expense (allocated by General Accounting Office):						
Net cost of Canal Zone Government (note a)	6,737,951	3,628,128	10,366,079	19,153,898	12,140,136	31,294,034
Interest payable to U. S. Treasury (note b)	6,869,894	1,977,361	8,847,255	18,518,673	5,439,180	23,957,853
Administrative and other general expenses (note c)	1,125,351	3,832,363	4,957,714	2,916,069	9,630,222	12,546,291
	14,733,196	9,437,852	24,171,048	40,588,640	27,209,538	67,798,178
Net income (−loss)	9,530,645	−5,370,635	4,160,010	27,836,504	−14,807,971	13,028,533
Adjustments proposed by General Accounting Office:						
Additional depreciation of waterway (note d)	2,900,000		2,900,000	8,650,000		8,650,000
Reduction of interest by transfer of waterway at net amortized value, July 1, 1951 (note d)	−2,100,000		−2,100,000	−5,700,000		−5,700,000
Depreciation on capitalized interest during construction (note e)	500,000		500,000	1,500,000		1,500,000

	1954			Three years ended June 30, 1954		
	Canal activity	Business activities	Total	Canal activity	Business activities	Total
Interest on the investment of the United States in Canal Zone Government (note f)	420,000	230,000	650,000	1,050,000	700,000	1,750,000
	1,720,000	230,000	1,950,000	5,500,000	700,000	6,200,000
Net income (−loss) after proposed adjustments (note g)	$7,810,645	−$5,600,635	$2,210,010	$22,336,504	−$15,507,971	$6,828,533

(a) Net costs of Canal Zone Government are allocated on the revenue ratio defined in section 412 (b) of the Canal Zone Code. This results in an allocation of 65 percent of these costs to the canal activity for 1954, 63 percent for 1953, and 55 percent for 1952. If the allocation were to be made on the basis of gross investment in fixed properties (see recommendation to the Congress, p. 9) about 78 percent of the costs would have been allocated to the canal activity.

(b) Interest for the fiscal years 1952, 1953, and 1954 is computed at 1.95, 2.05, and 2.342 percent, respectively, on $377,764,946, the net direct investment of the Government in the Company. Comments on interest expense are contained on page 19.

The capital base, that is, the gross investment in fixed properties, at June 30, 1954, used for allocating interest to all activities is $538,829,356 exclusive of defense facilities of $117,162,256. About 78 percent of this is invested in facilities of the canal activity and the remaining 22 percent in facilities of all other activities. This relationship has been approximately the same for the past 3 years.

(c) Most of the administrative and other general expenses were allocated on a direction-of-effort basis; the remainder was charged directly to the applicable activity. The direction-of-effort basis was used by the Company in 1953 for statistical purposes and seems reasonable. It results in an allocation of approximately 25 percent to the canal activity.

(d) About $290,000,000 of costs have been incurred by the Canal organization for excavation, fill, titles and treaty rights, etc., mainly in connection with the original construction of the waterway and dredging improvements of $34,000,000 since 1914 added to construction costs in 1954. Assuming a life of 400 years, which is used for the lock chambers and other structures, annual depreciation or amortization of $2,900,000 would be required to recover the costs for 1954 or $8,650,000 for the 3-year period since the reorganization of July 1, 1951. On the other hand, if depreciation had been accumulated over the 37 years from 1914 to 1951, when the assets were transferred to the present Company, the base on which interest is payable to the United States Treasury would be reduced by about $72,000,000. At the interest rates in effect for each of the 3 years, this would reduce interest expense for the period by about $5,700,000, $1,800,000 for each of the years 1952 and 1953 and $2,100,000 for 1954. The net increase in expenses would thus be $800,000 for 1954 and $2,950,000 for the 3-year period.

(e) Interest during construction was originally calculated to be $128,991,063 on the basis of compound interest but was later reduced to $50,892,311 on the basis of simple interest. This amount is excluded from the interest base. At a life of 100 years for canal properties, annual depreciation of about $500,000, or $1,500,000 for the 3 years, would be required. Depreciation from 1914 to 1951 would be $18,000,000.

(f) The investment of the United States Government in the Canal Zone Government, $28,000,000, is non-interest-bearing. Interest on this amount would have amounted to $650,000 for 1954 and $1,750,000 for the 3 years and has been allocated on the same basis described in note a.

(g) The Canal Zone Government would have recovered an estimated $2,000,000 for 1954 and $6,000,000 for the 3 years from the Armed Services if full charges could have been made during 1952, 1953, and 1954 for costs of hospital, school, police, postal, sanitation, and health services. If these costs had been recovered, the net income would have been about $4,200,000 for 1954 and $13,000,000 for the 3 years. About $1,300,000 and $3,700,000, respectively, would have been allocable to the canal activity on the same basis described in note a. We estimate that more than $1,000,000 of hospital and school costs will be recovered from other Government agencies in 1955 under provisions of section 107 of the Civil Functions Appropriations Act, 1955.

[fol. 58] Operating losses of business activities

It is obvious from the foregoing summary that the canal activity has recovered the major part of the general corporate charges and provided the Company's entire margin of income. Also, tolls at the present rates have recovered those interest and amortization charges which we have recommended for inclusion in the toll rates calculation. Conversely, the business activities have not recovered a proportionate share of general corporate charges. Approximate losses for the individual activities, based on our allocation methods, are shown below. Any other reasonable allocation would produce generally the same results.

	1954	3 years ended June 30, 1954
Allied maritime operations:		
Marine terminals	$210,000	$930,000
Vessel repair	290,000	840,000
Hotel Washington	80,000	210,000
Supporting services:		
Transportation and utilities:		
Railroad	530,000	1,370,000
Motor transportation	200,000	410,000
Steamship line	230,000	960,000
Power system	160,000	630,000
Telephone system	50,000	290,000
Water system	80,000	370,000
Employees' services:		
Commissaries	820,000	1,630,000
Service centers	350,000	1,080,000
Housing:		
U. S. rate (including furniture and garage rental and other miscellaneous services)	470,000	1,890,000
Local rate	500,000	1,120,000
Other supporting services:		
Engineering and maintenance	650,000	1,920,000
Supply	290,000	70,000
Tivoli Guest House	50,000	110,000
Printing plant	50,000	120,000
Grounds maintenance	50,000	100,000
Unallocated—nonrecurring corporate expense	210,000	760,000
	$5,370,000	$14,810,000

The losses in the business activities are attributable in a large degree to the high cost incurred in employing United States citizens in positions that could be filled locally. United States citizens constitute a large community in the Canal Zone and are used in all except the very lowest grades of labor. To obtain United States citizens for work in the

tropics, the Company incurs abnormal expenses in the form of premium wages, additional leave, free vacation travel, recruitment, and repatriation. Also, the Company bears most of the net cost of furnishing services generally provided by state and municipal governments by including only a part of these costs in prices to the customers of the business activities.

A report entitled "Study of Overseas Personnel and Pay Practices of Sixteen Private Firms" jointly prepared in November 1952 by the Bureau of the Budget, Civil Service Commission, Department of State, and Department of Defense states that (1) the number of United States citizens employed by the firms under study ranged from one-half of 1 percent to 5 percent of the total number of overseas employees and (2) native workers are employed in almost every category of position including responsible technical and executive posts.

The Virgin Islands Corporation, a wholly owned Government corporation in the Caribbean area, employs less than [fol. 59] 10 continental United States citizens out of a total of about 1,200 employees who, although United States citizens, are natives of the Virgin Islands or Puerto Rico and receive compensation comparable to that paid by businesses in that area.

From 1921 to date, except for the World War II period, about 25 percent of Canal organization employees have been United States citizens. (See p. 53.) U. S. rate employees in the Canal Zone hold positions in all categories except journeymen's helpers, day laborers, porters, custodians, stevedores, sales clerks, messenger, etc. This compares unfavorably with the practice of commercial companies operating overseas. The wisdom of operating supporting facilities for a disproportionate number of United States citizens is seriously questioned.

We believe that the proportion of United States citizens could be substantially reduced at the present time by employing Panamanians in many semiskilled and clerical jobs. Under a proper program of apprenticeship and training, Panamanians could fill positions requiring greater skills and responsibilities. The transition would not mean a wholesale firing of present employees but could be accomplished largely by attrition. There is an urgent need for long-range planning, full-time direction, and continuity

of management to cope with these problems. (See recommendations 1, 8, and 9, appendix B.)

Revenues from business activities have been adversely affected by reductions in the number of employees who are the principal customers. The proposed treaty between the United States and Panama is expected to result in further reductions in employee-customers. As the number of employees in the Canal Zone is reduced, a policy of basing prices at levels in effect in the United States becomes more urgent.

The Company's practice of establishing relatively low prices for commodities and services has resulted in fringe benefits to Canal organization employees and contributed to the losses sustained by business activities. Generally, sales of commodities and services to employees have been considered a transaction within the Canal organization, and, as such, the prices charged have not included all elements of Canal Zone Government costs and other general corporate expenses. In December 1953 the Governor and the comptroller prepared a pricing policy statement for submission to the board of directors. Basically the policy conformed to the Company's practice for the past 2 years. However, the statement was not officially presented to the board because the Company's general counsel stated that in his opinion the policy was not in accord with the intent and purposes of the basic legislation. We concur in the opinion of the general counsel that, insofar as transactions with the Company are concerned, employees have the same status as other customers. As of December 10, 1954, no further action had been taken by the management or board of directors to formalize the existing pricing policy.

We offered a possible solution to the pricing problem in our 1953 audit report. We recommended that the legislative committees consider amending the Canal Zone Code to set forth principles for determining prices. (See recommendation to the Congress, p. 11.) We suggested as one of the basic principles that prices, other than tolls, be established at levels in effect in cities in the United States, for example, Washington, D. C., Miami, New Orleans, or a combination [fol. 60] of several places. We did not propose that prices be set on individual items, but, rather, on cost-of-living indexes prepared by the Bureau of Labor Statistics. The

purpose of the suggestion was to relate the pricing policy to salary and wage levels of Canal Zone employees, which are set at present to correspond to those paid Federal employees and others in the United States plus a 25 percent incentive differential for employment in the Canal Zone. The pricing policy would help to stabilize the economy and protect employees against higher prices than those paid by other Federal employees in the United States. This policy assures reasonable prices to employees and may increase the revenues of the Company, but operating losses will continue to be substantial. Also, the pricing policy would eliminate the necessity for fringe benefits, cost-of-living differentials, and any allocation formulas for general expenses, interest, and civil government costs to determine prices or toll rates.

The adoption of a policy of rigid economy in the operation of the business activities and increasing prices for goods and services is not the sole answer to the problem. Some of the business activities are basically unprofitable because of a volume of business insufficient to support them economically. The solution may lie, to some extent, in eliminating or curtailing such operations as the steamship line and the railroad, and using available commercial steamship services and trucks instead, consideration of which we have previously recommended.

In any event, we believe that under an efficient and economical operation the business activities in the aggregate would continue to show losses; however, these losses would be reduced to a minimum. Such losses represent a cost of operating the waterway and, therefore, must ultimately be borne by the canal activity. If tolls revenue is insufficient to cover the minimum losses, appropriations will be needed. Such appropriations for the business losses would, of course, constitute a subsidy to ship operators. (See recommendation to the Congress, p. 8.)

Change in nature of operation.

There was little change in the nature of the operations during the year, although there were some transfers of functions between divisions and some consolidations of facilities. The Republic of Panama assumed responsibility for garbage collection and sanitation in the cities of Colon

and Panama at the beginning of the year and thus relieved the Canal Zone Government of a substantial annual expense. The Department of the Navy reimbursed the Company in 1954 for the cost of maintaining idle defense facilities. In 1953 the cost of providing this service, amounting to $140,742, was recorded as a general corporate expense.

During the year some of the Canal Zone Government policemen assigned to guard duties at Panama Canal Company installations were replaced by local rate guards employed by the Company. This not only reduced personnel costs but transferred the cost from the Canal Zone Government to the Company.

[fol. 61]

Tolls

Tolls revenue

Tolls revenue, tonnage handled, and the number of transits by ocean-going vessels were higher in 1954 than anticipated, only slightly lower than the record levels of 1953. Commercial tolls and transits were higher than in 1953 because of increased traffic by ships of foreign registry. A decline in the number of transits by United States Government vessels and the related tolls credit approximately offset the increase in tolls and transits of commercial vessels. Comparative traffic and tonnage statistics for 1954 and 1953 are shown in appendix E. Comparative revenues for the 2 years follow.

	1954		1953	
	Amount	Percent of tolls revenue	Amount	Percent of tolls revenue
Tolls revenue:				
Ocean-going commercial vessels:				
U. S. registry	$10,987,045	27	$10,613,921	28
Foreign registry:				
Panamanian	2,356,326	6	1,796,289	5
Other	20,804,492	56	19,507,868	52
	33,247,863	89	31,918,678	85
Coastal vessels (under 300 tons)	54,286	...	55,131	...
U. S. Government vessels	3,888,957	11	5,557,682	15
	$37,191,106	100	$37,530,891	100

Toll rates

The Company collects tolls for all vessels transiting the canal except vessels of the Republic of Panama, war vessels

of the Republic of Colombia, and vessels transiting the canal solely to undergo repair in the Company's shops. Prior to July 1, 1951, vessels owned, operated, or chartered by the United States Government transited the canal free, but since that date the Company has received credit against its obligations to the United States Treasury for tolls on these vessels, calculated at regular rates.

Tolls are levied against cargo-carrying vessels on the basis of Panama Canal net tons, 100 cubic feet of cargo-carrying space. The present rates, in effect since 1938, are 90 cents a ton for laden vessels and 72 cents for vessels in ballast. Noncargo vessels are charged 50 cents a displacement ton.

The Company is authorized to prescribe toll rates and rules for the measurement of vessels (2 Canal Zone Code 411). Any changes, however, must be published in the Federal Register 6 months in advance of the effective date, during which period open hearings must be held, and the new rates become effective only upon approval of the President of the United States whose action is final and conclusive.

Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the canal, together with the facilities and appurtenances related thereto, including interest, depreciation, and an appropriate share of the net costs of Canal Zone Government (2 Canal Zone Code 412 (b)). Excluded from the formula by specific provision of the code or by omission from section 412 (b) are (1) interest on the investment in Canal Zone Government, (2) interest on interest during construction, (3) costs allocable to national defense, and (4) amortization of $340,000,000 for cost of construction [fol. 62] and improvement of the waterway. We believe these costs, except interest on interest during construction and costs allocable to national defense, should be included in the formula. (See recommendations to the Congress, pp. 8 and 9.)

[fol. 63] Factors Affecting Future Operating Results

Future operating results of the Canal organization may be affected materially by the following factors:

1. Treaty with Republic of Panama
2. Salary increases for Federal employees

3. Removal of slide hazard at Contractors Hill
4. Conversion of electrical system
5. Free vacation transportation for employees and their families
6. Recovery of school and hospital costs
7. Abandonment of railroad and construction of highway

Some of these factors involve changes in the scope or type of operations with resultant changes in the number of employees required. Any change in the number of employees in any one activity has an effect on the operation of all supporting services, because employees are the principal users of housing, commissary, utility, school, hospital, and other services.

Some of these factors tend to decrease employment levels, although temporary increases may result in a few areas. As a reduced volume of business will increase the unit costs in the supporting operations, the management should keep abreast of changing operating conditions and minimize losses by consolidating facilities or discontinuing nonessential operations. The financial effects of all these changes are unknown, because the management has not had sufficient time to make a complete forecast.

Treaty with Republic of Panama

On January 25, 1955, a "Treaty of Mutual Understanding and Cooperation between the United States of America and the Republic of Panama" and "Memorandum of Understandings Reached" were signed by representatives of the two countries. These agreements will not become effective until ratified by both governments. Legislation will be needed to accomplish some of the provisions. Nevertheless, we are including comments on certain of the provisions because of their possible effect on future operations.

Annuity

The annuity paid by the United States to Panama would be increased from $430,000 to $1,930,000, thus increasing the annual cost of operations by $1,500,000.

Salaries and wages

The Congress will be requested to enact legislation authorizing the establishment of a single basic wage scale

and providing for uniform application of the Civil Service Retirement Act for all United States and Panamanian employees of the United States Government in the Canal Zone. Panamanian citizens would be afforded equality of opportunity for employment in all Government positions in the Canal Zone for which they are qualified, and all Government positions in the Canal Zone would be evaluated, classified, and titled without regard to the nationality of the incumbent or proposed incumbent.

The extent to which these benefits will affect annual payroll costs cannot be determined until all positions in the Canal organization have been classified. At June 30, 1954, [fol. 64] there were 10,951 full-time employees on the local rate rolls, of whom 7,281 were Panamanian citizens, and the remainder were either citizens of other countries or their citizenship was undetermined. The average annual salary of local rate employees in the Canal Zone during 1954 was $1,310; the average annual salary of United States citizen employees, including the 25 percent differential was $6,062. In some areas local rate and U. S. rate employees perform similar duties, although substantially all of the skilled craftsmen and supervisors are United States citizens.

Commissary and other employee services

As a means of enabling the Panamanian economy to obtain an increased share in the business of supplying the Canal Zone market, the following actions are proposed.

1. The Panama Canal Company will discontinue manufacturing and processing goods for sale to or consumption by individuals when it is determined that such goods are and will continue to be available in Panama in satisfactory quantities, quality, and at reasonable prices.

2. As of December 31, 1956, commissary, import and other privileges, except those essential to health or necessary to performance of duties, will be withdrawn from non-United States citizen employees of Canal Zone agencies who do not reside in the Zone.

3. As of December 31, 1956, all United States agencies in the Canal Zone will discontinue selling supplies (except fuel and lubricants) to ships except those owned or operated by the United States Government.

4. Items imported for resale in the Canal Zone will be acquired from United States or Panamanian sources unless it is not feasible to do so in certain instances.

At June 30, 1954, almost 500 employees, mostly local rate, were engaged in manufacturing and processing operations. Many of these employees will not be needed if the manufacturing and processing operations are performed in Panama.

Sales in local rate commissaries in 1954 amounted to about $9,400,000. The withdrawal of commissary privileges from about 7,000 non-United States citizens who reside in Panama will reduce these sales by about $6,000,000. About two-thirds of the 356 employees in the local rate commissaries (330 local rate and 26 U. S. rate) will not be needed if the number of local rate commissaries is reduced to a minimum.

Estimated sales of supplies to ships in 1954 were somewhat less than $2,000,000.

Ferry operations

Congressional authority and appropriations will be sought for the construction by the United States of a bridge across the canal at Balboa on the Pacific side of the Isthmus. This would remove the need for operating the present ferry service, which cost about $560,000 in 1954. There were 97 employees engaged in the ferry service at June 30, 1954.

[fol. 65] Transfers of properties to Republic of Panama

The Congress will be requested to enact legislation authorizing conveyance without charge to the Republic of Panama of title to certain lands and improvements owned by the Company in territory under Panamanian jurisdiction when and as it is determined that these lands and improvements are no longer needed for the operation, maintenance, sanitation, or protection of the canal or its auxiliary facilities. These lands and improvements include the railroad yard and station in Panama City and properties in Colón.

Annual interest expense will be reduced if these lands and improvements are donated to Panama, because the

base on which interest is calculated will be reduced in accordance with section 246 (d) of the Canal Zone Code.

Terminal operations

When Panamanian port facilities in Colon are in operation, prompt consideration will be given to discontinuing the handling of commercial cargo for transshipment to Panama and other countries on Canal Zone piers.

Commercial cargo transshipments comprise a substantial part of the terminal business, most of which is handled on the Atlantic side adjacent to Colon.

At June 30, 1954, there were 1,907 employees engaged in terminal operations, of whom 1,824 were local rate. Many of these employees would not be needed if commercial terminal operations are discontinued.

During 1954 the operating margin of the terminals division before general corporate charges was $1,250,137, or about 30 percent of the operating margin of the business activities.

Salary Increases for U. S. Rate Employees

The Congress has been considering salary increases for Federal employees. A general increase in U. S. rate employees' salaries will increase the operating costs of all Canal organization activities.

Removal of Slide Hazard at Contractors Hill

Late in fiscal year 1954 the president of the Company reported that movements in the agglomerate mass in Contractors Hill on the banks of Gaillard Cut (formerly Culebra Cut) indicated a condition of increasing instability which warranted immediate study to determine possible action. Geologists from the Corps of Engineers and from civilian life were called to the Canal Zone for consultations.

In a report to the board of directors in May 1954 the president summarized the geological findings and recommended preventive action. The board approved the president's recommendations and authorized him to take every further action necessary to meet the emergency, including employing experts and consultants and entering into contracts by negotiation or otherwise.

On May 25, 1954, the Company contracted with the Tecon Corporation of Dallas, Texas, for the removal of approximately 2,350,000 cubic yards of rock and earth from Contractors Hill within a period of 15 months. The total cost of the contract work will depend on the number of cubic [fol. 66] yards of material removed, but it is estimated that it will amount to about $3,400,000, including $300,000 for mobilization of equipment at the site. The estimated total cost is about $5,000,000, including planning, engineering, inspection, and other work by Company employees. In a meeting on July 24, 1954, the board of directors approved a recommendation of the comptroller that this cost be treated as a deferred charge to maintenance and amortized at the rate of $200,000 a year beginning with fiscal year 1955. In the past, work of this nature has been classified as a capital improvement. If the cost were to be amortized over the same period as the remaining useful life of the lock chambers, the annual charge would be about $85,000.

Conversion of Electrical System

The Canal Zone electrical system still operates on 25-cycle current generated at the Company's power plants. This type of current was selected during construction days as most suitable for locks operations. In recent years it has become increasingly difficult and costly to obtain 25-cycle industrial and domestic equipment. The board of directors therefore has approved a plan to convert the electrical system to 60-cycle at an estimated cost of $24,000,000, including $11,000,000 for conversion of locks machinery and replacement of towing locomotives and other locks equipment. Conversion of the entire system is scheduled for completion in 1961.

The cost of equipment will be materially higher than that being replaced, resulting in higher annual charges for depreciation than at present.

Vacation Travel

The Administrative Expenses Act of 1946 (60 Stat. 806) was amended on August 31, 1954, to provide free round-trip vacation transportation to Government employees and their immediate families from posts of duty overseas to their place of actual residence in the United States. The

amendment specifies that in order to obtain this free transportation an employee must have completed an agreed period of service overseas and, prior to his departure, must have agreed in writing to serve another tour of duty at the same or some other overseas post. Twenty-six months is considered a tour of duty in the Canal Zone.

Prior to enactment of this legislation, it was the Company's policy to permit employees to return to the United States annually on the steamship line at a 75 percent discount in fare. Employee discounts, except for special cases, were discontinued effective November 1, 1954. Many employees may now wish to travel directly to their places of residence rather than through New York City, the only United States port of call of the steamship line. Only 43 percent of the employees have declared the Middle and North Atlantic States as their places of residence. A substantial decline in the number of employee-passengers would be another factor in considering the continued operation of the steamship line on the present basis.

Although the Company was already absorbing 75 percent of the cost of ocean transportation for most vacationing employees and their families (see p. 19), additional costs will be incurred for inland transportation.

[fol. 67] Recovery of School and Hospital Costs

The Civil Functions Appropriation Act, 1955, provides that other Government agencies will reimburse the Canal Zone Government for their full proportionate share of the cost of school and hospital services. We estimate that these costs will amount to more than $1,000,000 in 1955.

Abandonment of Railroad and Construction of Highway

In October 1954 the board of directors approved recommendations by the president of the Company that the Panama Railroad be abandoned, that a trans-Isthmian highway totally within the Canal Zone be constructed as soon as possible by the Canal Zone Government at an estimated cost of $9,000,000, and that the Company include in the 1956 budget provision for the purchase of a fleet of motor vehicles for the transportation of Canal organization freight and passengers. We are informed that the principal reason for constructing a new highway totally

within the Canal Zone is that the present trans-Isthmian highway is under the jurisdiction of the Republic of Panama.

Railroad operations have been unprofitable for several years (after allocation of general corporate expenses), principally because of increasing competition from motor transportation, including military and private Panamanian, operating over the United States-built trans-Isthmian highway in the Republic of Panama. The reported net operating income for 1954 before general corporate charges was $24,085 compared with $124,046 for 1953 before similar charges. Operating income was insufficient in either year to cover a proportionate share of administrative and other general expenses.

At June 30, 1954, the net cost of railroad facilities and equipment which would be abandoned was $1,544,288, after deducting accumulated depreciation and valuation allowances totaling $10,691,741. In 1954 annual depreciation charges amounted to $90,349. It appears that both operating costs and the number of U. S. rate employees would be substantially reduced through the use of motor vehicles on the present trans-Isthmian highway.

In our opinion traffic over the existing trans-Isthmian highway is insufficient to warrant a new highway at this time, and a new highway should not be constructed unless it is necessary for defense. The Department of the Army pays for the maintenance of the present highway and we know of no restrictions imposed by the Republic of Panama on its use by Government agencies and their employees.

If a defense highway is to be built, the Congress should approve the construction and appropriate the necessary funds to the Department of Defense. In any event estimates of construction costs should be obtained from private contractors before starting the project.

[fol. 68] Investment of the United States Government

The amounts of the United States Government's net direct investment in the Company and in the Canal Zone Government are subject to adjustment upon completion of the inventory and appraisal of assets. Appraisal of the assets transferred to the Company from the Panama Canal agency on July 1, 1951, is required by law. The Canal

organization is also appraising all other properties so that all property valuations will be stated on a consistent basis.

The tentatively stated investment of the United States in the Panama Canal Company and Canal Zone Govern- [fol. 69] ment at June 30, 1954, is summarized. (See exhibits 3 and 6 for details of changes in investment during the year.)

Panama Canal Company:		
Net direct investment:		
Par value of capital stock of original Company, wholly owned by the United States since 1905		$ 7,000,000
Net recorded value of assets and liabilities transferred from Panama Canal agency pursuant to Executive Orders 10102 and 10263, including proceeds from subsequent disposal of properties transferred at no value		406,519,807
Gross direct investment		413,519,807
Less:		
Dividends paid into the U. S. Treasury from 1904 to 1950	$23,994,905	
Fair market value of land conveyed to Republic of Panama	11,759,956	35,754,861
Net direct investment at June 30, 1954, interest-bearing (exhibit 3)		377,764,946
Total accumulated income, as defined in Company's Federal charter, non-interest-bearing		85,032,832
Total investment (2 Canal Zone Code 246) of U. S. Government in Panama Canal Company at June 30, 1954 (exhibit 3)		462,797,778
Canal Zone Government:		
Investment of the U. S. Government, representing excess of assets over liabilities at June 30, 1954, as recorded, non-interest-bearing (exhibit 6)		28,107,764
Total investment of the U. S. Government at June 30, 1954, as tentatively stated (exhibit 1)		$490,905,542

Survey of the Accounting System

The Canal organization improved its central accounting system substantially during 1954, but much remains to be done to improve procedures in the accounting performed at operating levels. Making these improvements will take time because the numerous activities in which the organiza-

tion is engaged (see appendix C) are widely scattered throughout the Canal Zone. The job has been delayed because the system's staff is small. It is difficult to recruit qualified men for system work in the Canal Zone because the Company is unwilling to offer adequate salaries. (See p. 54.)

On July 1, 1953, a revised and improved chart of accounts was adopted, new bookkeeping machines were placed in operation to facilitate current posting to the general ledger accounts and to the voluminous job order accounts, and reporting procedures were revised. The accounting system for the hospitals is being revised.

One of the basic requirements of any accounting system is timely reporting of useful data to management and to operating supervisors. Before any reports are made, the system should provide reasonable controls to assure the accuracy of information being disseminated. The revised reporting is deficient because the information given to operating supervisors is not readily useful and the system places reliance on the unit supervisors to disclose inaccuracies.

The accounting system is deficient at present because urgently needed improvements have not been made at operating levels. Controls over the preparation and distribution of basic documents at the operating levels should be strengthened, and many of the accounting forms should be revised or eliminated. In our opinion, these areas should receive the immediate attention of the Company's system staff.

[fol. 70] Scope of Audit

Our audit of the Panama Canal Company and Canal Zone Government for the fiscal year 1954 included a review of the procedures and controls, a selective examination of transactions, and an examination of the financial statements as of June 30, 1954. We examined selected transactions to the extent deemed appropriate under existing circumstances and to settle the accounts of fiscal officers for the year ended June 30, 1954, with due regard for the nature and volume of transactions and the effectiveness of management controls. Our audit was conducted in the Canal Zone and in the Company's branch office in New York City.

Opinion of Financial Statements

The accompanying financial statements are based on the accounting records. Except for reclassifications, the statements of the Panama Canal Company are the same as those published in "The Budget of the United States Government for the Fiscal Year Ending June 30, 1956."

Fixed assets, allowances for depreciation, inventories, indebtedness due the Treasury, investment of the United States Government, and related expenses are subject to adjustments upon completion of the appraisal and inventory of assets transferred to the Company at July 1, 1951, as required by law to be made by the Company and approved by the Director of the Bureau of the Budget.

No depreciation or amortization has been provided since 1914 on $340,000,000 of construction and improvement costs of the Panama Canal, including capitalization interest during construction. This represents about 75 percent of the total construction cost.

A reserve of $50,892,311 has been established completely offsetting capitalized interest during construction. Consequently, the financial statements do not show properly the total investment of the United States.

For reasons given above and further comments contained in notes 4, 5, and 8 to the financial statements, we are unable to state that the accompanying balance sheets (exhibits 1, 2, and 5), and the related statements of income or net cost of operations (exhibits 4 and 7) and of changes in investment of the United States Government (exhibits 3 and 6) present fairly the financial position of Panama Canal Company and Canal Zone Government at June 30, 1954, or the results of their operations for the year then ended.

[fol. 71] Notes to Financial Statements—June 30, 1954

4. Inventories of materials and supplies are valued generally at average cost landed at the Isthmus, exclusive of United States freight to port of embarkation, less a valuation allowance of $512,660 representing the cost of a part of the obsolete, slow-moving, and excess materials and supplies acquired by transfer from the Panama Canal agency. A reclassification and reappraisal of the remaining items are in process.

[fol. 72] 8. Ownership of the Company by the United States Government is evidenced by a receipt held by the Secretary of the Treasury. Section 246, title 2, Canal Zone Code, provides for the amount of the ownership receipt to be changed from time to time so as to represent the net direct investment of the United States in the Company. The changes are specified as resulting from (a) funds advanced to the Company from the Treasury pursuant to appropriation by the Congress to meet increased capital needs, (b) transfers of assets, less liabilities, to the Company from other Government agencies, pursuant to applicable provisions of law, (c) conversely, transfers from the Company to other Government agencies, and (d) dividends paid to the Treasury and other expenditures and losses as a result of directives based on national policy, not related to the Company's operations, and not reimbursed by specific appropriations.

Before July 1, 1951, when the waterway and appurtenances and other business enterprises of the Panama Canal agency were transferred to the Company pursuant to the act of September 26, 1950, the dividends and other expenditures and losses, analogous to dividends, had greatly exceeded the total capital contributions and the amount of the ownership receipt stood at the nominal amount of $1. Effective with this transfer, the total direct investment was greatly increased, even though final determination of the amount of the transfer has not yet been made. The accounts of the Company, adjusted to June 30, 1954, show the amount of the net assets transferred at July 1, 1951, to be $377,764,946. The amount was net of $25,507,098, representing the excess of prior years' dividends and other repayments over total direct investment to June 30, 1951. It has been clearly recognized that the value for transfer, as provided for in the Company's Federal charter, cannot be determined until the appraisal has been completed and approved by the Director of the Bureau of the Budget. No change has yet been made in the amount of the ownership receipt.

Except for the adjusted reported net income for the 1952, 1953, and 1954 fiscal years, totaling $13,028,533, and about $4,000,000 of undistributed net earnings of the Panama Railroad Company before acquisition by the United States, the accumulated income retained was earned by the Com-

pany during its status as an adjunct to the Panama Canal agency when its principal operations consisted of the commissaries, steamship line, railroad, and marine terminals.

A further provision in section 246 requires that the Company reimburse the Treasury for the interest cost of the Government's net direct investment in the Company. However, paragraph (e) of section 412 provides for the deduction of capitalized interest during construction from the amount of the Government's investment subject to interest.

The net direct investment was reduced in November 1954 by a capital refundment of $10,000,000 paid into the United States Treasury pursuant to section 253 of title 2 of the Canal Zone Code.

[fol. 73]

APPENDIX E

OPERATING STATISTICS

Panama Canal Company

Canal and Other Marine Operations

Canal traffic by nationality of vessels:

	1954		1953	
	Number of transits	Long tons of cargo (000 omitted)	Number of transits	Long tons of cargo (000 omitted)
Ocean-going commercial vessels:				
U. S. registry	2,056	11,868	2,166	12,661
Foreign registry:				
Panamanian	611	3,666	444	2,592
British	1,265	7,727	1,365	7,877
Norwegian	831	3,484	877	3,303
Japanese	387	2,481	320	2,113
Honduran	347	493	400	570
German	323	708	230	353
Danish	275	936	206	885
Swedish	230	819	182	735
Liberian	224	1,416	131	931
Italian	211	1,160	141	678
Colombian	205	241	144	145
Greek	146	1,247	92	829
French	136	583	141	567
Netherlands	130	685	112	495
Ecuadorean	106	93	152	88
All others (1954—17 countries; 1953—18 countries)	301	1,488	307	1,273
Total	7,784	39,095	7,410	36,095
Coastal vessels (under 300 tons)	1,222	66a	1,294	67a
U. S. Government vessels	1,139	4,603a	1,466	6,496a
	10,145		10,170	

aPanama Canal net tons.

[Fol. 74] EXHIBIT "B" TO MOTION

HOUSE OF REPRESENTATIVES

80th Congress, 2d Session Report No. 2396

AMENDING THE CANAL ZONE CODE FOR THE PURPOSE OF INCORPORATING THE PANAMA RAILROAD COMPANY

June 17, 1948—Committed to the Committee of the Whole House of the State of the Union and ordered to be printed

Mr. Weichel, from the Committee on Merchant Marine and Fisheries, submitted the following

REPORT

[To accompany S. 2747]

The Committee on Merchant Marine and Fisheries to whom was referred the bill (S. 2747) to amend the Canal Zone Code for the purpose of incorporating the Panama Railroad Company, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

Purpose of the Bill

Section 304(b) of the Government Corporation Control Act, approved December 6, 1945, prohibits the continued existence, as an agency or instrumentality of the United States, after June 30, 1948, of any wholly owned Government corporation created by or under the laws of any State; and requires the proper corporate authority of every such corporation to institute dissolution or liquidation proceedings before that date, with the proviso, however, that any such corporation may prior thereto be reincorporated by act of Congress for such purposes and term of existence and with such powers, privileges, and duties as authorized by such act, including the power to take over the assets and assume the liabilities of its respective predecessor corporation.

The broad purposes of the bill (S. 2747) are to fulfill, through incorporation of the Panama Railroad Company by

act of Congress, this requirement of the Government Corporation Control Act, and to provide a charter appropriate and adequate for the efficient and successful performance of the role assigned to the company.

The company was incorporated by an act passed by the legislature of the State of New York April 7, 1849. It op- [fol. 75] erated under private control until 1881, when the original French Canal Co. acquired most of the 70,000 shares of its stock. This company and its successor, the New Panama Canal Co., continued to operate the railroad as a common carrier and also as an adjunct in their attempts to construct a canal. In 1904 their shares of stock in the Panama Railroad Co. (68,888 shares) passed to the ownership of the United States as a part of the assets of the New Panama Canal Co., which were purchased for the sum of $40,000,000, as authorized by the Spooner Act of June 28, 1902 (38 Stat. 481). The remaining 1,112 shares were purchased from private owners in 1905.

The company, which is an adjunct of the Panama Canal, operates the railroad across the Isthmus of Panama, which, although traversing the Canal Zone, has its freight and passenger terminals in the cities of Colon and Panama in the Republic of Panama. It also operates a steamship line between New York and the Isthmus, the docks and harbor terminals on the Isthmus, coaling plants for ships, commissary stores supplying employees and ships, dry and cold storage plants for supplies, two hotels, and the telephone system for the Canal Zone; all of a purely commercial character essential to the operation of the Canal, and the maintenance of employees required in the conduct of the Canal enterprise.

Section 5 of title 2, Canal Zone Code (48 U.S. Code, sec. 1305) authorizes the President to govern and operate the Panama Canal and govern the Canal Zone through the Governor of the Panama Canal. Sections 51 and 52 of title 2 of the code authorizes the President to operate through the Panama Canal or the Company's various business operations connected with the Canal.

The policy of the United States, since the acquisition of the Panama Railroad Company in 1904, has been to make the company an adjunct, first to the construction of the Canal, and thereafter to the maintenance, operation, sani-

tation, government, and protection of the Panama Canal and the Canal Zone. The company also performs subsidiary but important functions as a service organization for the Army, Navy, and other Government organizations, and as a transportation facility serving the needs of the Republic of Panama and the Canal Zone.

The President exercises his supervision and control over both the Panama Canal and the Panama Railroad Company through the Secretary of the Army, and the Governor of the Panama Canal is always President of the Company. This provides the proper coordination of all of their activities. Your committee considers it essential that the operations of the company be in complete harmony with the agency that maintains and operates the Canal which serves the commerce of the world in peacetime but is devoted largely to the needs of the war effort in wartime.

Explanation of Bill by Sections

The bill adds at the end of chapter 12 of title 2 of the Canal Zone Code a new article numbered 3, embracing new sections 245 to 256 of said title 2.

The purposes of the corporation are so stated in section 245 as to describe it broadly as the business adjunct of the Panama Canal. It authorizes the President to conduct [fol. 76] through the corporation the various business operations incident to United States Government activities on the Isthmus of Panama. The statement of the broad purposes of the corporation bears a direct relationship to the provision in the organic act of August 24, 1912 (now sec. 5 of title 2, Canal Zone Code; 48 U. S. Code, sec. 1305), which will not be changed by this legislation, authorizing the President to govern and operate the Panama Canal and govern the Canal Zone through the Governor of the Panama Canal, and to the authority vested in the President by section 6 of the organic act (now secs. 51 and 52 of title 2, Canal Zone Code; 48 U. S. Code, sec. 1323) to conduct various business operations incident thereto.

The provisions of the section dealing with the offices of the corporation and with its residence for venue purposes are in substantial effect continuations of the situation now prevailing with reference to the present corporation.

Section 246 contains provisions relating to the investment of the United States in the corporation.

Subsection (a) will require the corporation to deliver to the Secretary of the Treasury a receipt acknowledging the transfer to the new corporation of the net assets of the present corporation to evidence the ownership of the corporation by the United States. In its capacity as owner of the corporation, the United States will be represented by the President of the United States or such officer of the United States as may be designated by him.

Subsection (b) will require the amount of the receipt to be increased by the amount of any additional direct investments of the United States in the corporation due to (1) funds advanced to the corporation, and (2) any transfer of property to the corporation from other Government agencies pursuant to applicable provisions of law.

Subsection (c) will require the corporation to pay interest to the Treasury of the United States on the net direct investment of the Government in the corporation.

Subsection (d) prescribes the method by which the corporation shall account for its surplus. Credit items will include income from operations after 1904, when the Government acquired control of the company, together with undistributed net income prior to 1904. The debit items will include (1) payments to the Treasury of the United States as dividends not applied as offsets to direct capital contributions, and (2) extraordinary expenditures or losses incurred through directives based on national policy and not related to the operations of the company such as Public Law 28, approved May 3, 1943. These debit items are applicable against directly contributed capital in determining the base on which the corporation will be required to pay interest.

Section 247 vests the management of the corporation in a Board of Directors. It would permit the restriction of the Board of Directors to 9 persons, rather than 13 as at present, and would expressly authorize the stockholder to hold office as a director, as the Secretary of the Army does at the present time. The section makes a matter of law the present practice that the Governor of the Panama Canal be a director and the president of the corporation in the

interests of the necessary coordination of activities of the Canal-Railroad organization.

The provision negativing salaries for Board members follows the present practice. The provision as to per diem [fol. 77] allowance in lieu of subsistence and as to traveling expenses is deemed necessary and proper. The sentence respecting appointment and service as a director, officer, or employee of the Company, of any officer or employee of the United States is based generally upon like provisions in other Federal charters.

As suggested by the General Accounting Office representatives, the bill provides that a majority of the Board of Directors shall constitute a quorum for the transaction of business instead of five members as at present.

Section 248 grants the corporation certain general powers. Subsections (a), (b), (c), and (d), concerning corporate succession, seal, bylaws, and the power to sue and be sued, follow general corporate patterns and appear to require no comment. Subsection (e) relative to officers and employees follows generally the pattern of similar provisions in Government corporation acts, such as the Reconstruction Finance Corporation Act and the Tennessee Valley Authority Act. As in these acts, the appointment and compensation of officers and employees are not subject to civil-service and classification laws in the interests of providing greater flexibility in such appointments. It ~~would include~~ per annum employees under personnel ceiling determinations but not those in other categories whose numbers fluctuate from day to day and month to month with the great fluctuation in the volume of business which is dependent on factors beyond the control of the Company, such as the handling of cargo at the docks and terminal facilities and the furnishing of supplies and services to ships using *using* the Canal and its ports.

Subsections (f), (g), (h), and (i), relative to contracts, priority out of bankrupt estates, obligations and expenditures, and the acquisition, administration, and disposition of property, also follow general corporate patterns.

The first three subsections of section 249 enumerate the enterprises, facilities, and appurtenances which the Company may maintain and operate. The enumeration includes the various business operations which the President

is now authorized by law to conduct, through the Canal-Railroad organization, incidental to the maintenance and operation of the Panama Canal and government of the Canal Zone.

Subsection (d) restricts the operations to those permitted under the treaty with the Republic of Panama.

Subsection (e) would extend the franking privilege to the corporation under the same conditons as executive departments.

Subsection (f) authorizes such actions as are necessary or appropriate to carry out the powers conferred on the corporation. The programs and activities to be undertaken by the corporation are restricted to those included in its annual budget program submitted to and approved by Congress and those which may be transferred to it. An exception is provided to enable the corporation with appropriate limitations to take emergency action within the scope of the charter when Congress is not in session. It requires that a report on any such emergency activity be presented promptly to Congress, when it reconvenes, for its approval and such action as it may deem necessary or desirable.

Section 250 would subject the new corporation to the provisions of treaties with the Republic of Panama, the Canal Zone Code, and other acts of Congress applicable to the present corporation.

[fol. 78] Section 251 authorizes and directs the new corporation to take over the assets and assume the liabilities of the present corporation as of July 1, 1948. It provides for the dissolution of the old corporation and the vesting of property rights in the new corporation.

Section 252 requires the corporation to reimburse other agencies for payments made for the benefit of the corporation.

Section 253 requires the corporation annually to appraise its necessary working capital requirements together with reasonable foreseeable requirements for authorized plant replacement and expansion, and to pay into the Treasury as dividends the amount in excess of those requirements. The dividends are to be treated by the Treasury as miscellaneous receipts. On the books of the company the dividends are to be applied against direct capital contributions

in determining the base for interest payments to the Treasury of the United States under section 246.

Section 254 authorizes the corporation to borrow for limited periods of time for authorized purposes of the corporation from a fund to be established and maintained in the Treasury of the United States. The sums of money borrowed from this fund cannot exceed a total of $10,000,000 outstanding at any one time and must be repaid and redeposited into the fund. This fund is to be established by the deposit of funds of the present corporation. It will enable the corporation to function effectively without the necessity of large funded reserves.

Section 255 reserves the right to alter, amend, or repeal the provisions of this legislation.

Section 256 is the separability clause in one of the forms commonly used for such purposes.

This bill as reported is approved by the General Accounting Office, the Bureau of the Budget, and the Panama Railroad Company, and is concurred in by the Governor of the Panama Canal and the Secretary of the Army.

For the information of the Congress there is also set forth the provisions of section 304 (b) of the Government Corporation Control Act, approved December 6, 1945:

Section 304 (b) of the Government Corporation Control Act, Approved December 6, 1945

No wholly owned Government corporation created by or under the laws of any State, Territory, or possession of the United States or any political subdivision thereof, or under the laws of the District of Columbia, shall continue after June 30, 1948, as an agency or instrumentality of the United States, and no funds of, or obtained from, the United States or any agency thereof, including corporations, shall be invested in or employed by any such corporation after that date, except for purposes of liquidation.[2] The proper corporate authority of every such corporation shall take the necessary steps to institute dissolution or liquidation proceedings on or before that date: *Provided*, That prior thereto any such corporation may be reincorporated by Act of Congress for such purposes and term of existence and with such powers, privileges, and duties as authorized by

such Act, including the power to take over the assets and assume the liabilities of its respective predecessor corporation.

[fol. 79] EXHIBIT "C" TO MOTION

HOUSE OF REPRESENTATIVES

81st Congress, 2d Session — Document No. 460

PANAMA CANAL AND PANAMA RAILROAD COMPANY

Communication from the President of the United States Transmitting the Report and Recommendations of the Bureau of the Budget with Respect to the Organization and Operations of the Panama Canal and Panama Railroad Company, Pursuant to House Report No. 1304, Eighty-first Congress

February 1, 1950.—Referred to the Committee on Merchant Marine and Fisheries and ordered to be printed

The White House,
Washington, January 31, 1950.

Hon. Sam Rayburn,
Speaker of the House of Representatives.

DEAR MR. SPEAKER: I am transmitting herewith the report and recommendations of the Bureau of the Budget with respect to the organization and operations of the Panama Canal and Panama Railroad Company. The report was prepared pursuant to House Report No. 1304, Eighty-first Congess, first session.

The recommendations of the Bureau of the Budget have my approval except the recommendation with respect to the transfer of supervision of the Panma Canal from the Secretary of the Army to the Secretary of Commerce. I desire to give further study to that recommendation, particularly in connection with plans to carry out the proposals of the Commission on Organization of the Executive Branch of the Government which are now under consideration.

As preliminary steps to facilitate the recommended reorganization of the Panama Canal and the Panama Rail-

road Company I have today issued two Executive orders. The first delegates to the Governor of the Panama Canal authority to determine the internal organization of the Panama Canal. The second order transfers certain business operations from the Panama Canal to the Panama Railroad Company. These initial transfers will simplify and facilitate the early transfer to the Company of all business operations of the Panama Canal.

[fol. 80] While several of the recommendations can be implemented by Executive order, legislation is required to (1) authorize transfer of the Panama Canal to the Panama Railroad Company; (2) change the name of the Panama Railroad Company to Panama Canal Company; (3) authorize the Company's Board of Directors to establish toll rates, subject to the President's approval; (4) permit the Company to retain and utilize toll revenues; and (5) authorize appropriations to the Company to cover losses which might result from changes in economic conditions. I recommend the enactment of such legislation.

It is believed that implementation of the Bureau of the Budget's recommendations will result in a more logical grouping of functions, provide a sounder basis for determining toll rates and other charges, facilitate operations, and, in general, promote the more effective administration of the Panama Canal enterprise.

Very sincerely yours, Harry S. Truman.

Executive Office of the President
Bureau of the Budget, Washington 25, D. C.

Report to the President.

Subject: Organization of the Panama Canal and Panama Railroad Company.

Origin of Study

The act of August 24, 1937, amending the Panama Canal Act, authorizes the President to set Panama Canal tolls at a rate not to exceed $1 per ton for laden ships and at a lesser rate for ships in ballast. Shortly after the enactment of this legislation, the President set the rate at 90 cents a ton for laden ships.

For a number of years the Panama Canal has been con-

cerned by the failure of the revenues from tolls to meet greatly increased costs of operations. The question of increasing Canal revenues was discussed before the House Appropriations Committee in 1947 and on February 24, 1948, the committee recommended that the tolls charges should be raised to the statutory maximum. The Governor of the Panama Canal subsequently recommended to the President that tolls charges be increased to $1 per ton for laden ships. This recommendation was carried out by Presidential Proclamation No. 2775 of March 26, 1948, effective October 1, 1948. Six months' prior notice of an increase is required by law.

The issuance of the proclamation was met by vigorous protests from the shipping industry. As a result the Congress decided to review the whole question of tolls policy. House Resolution 44 (81st Cong., 1st sess.) authorized the Commitee on Merchant Marine and Fisheries or any duly authorized subcommittee thereof—

to make a full and complete analysis of the financial operation of the Panama Canal with particular reference to the proper accounting and allocation of costs attributable to—

(a) the transit of the Canal by commercial, governmental, and military vessels of the United States and foreign nations;

(b) military activities of the United States in and connected with the Canal Zone;

[fol. 81] (c) United States civil government; including, but not limited to, sanitation, public schools, playgrounds, hospitals, and so forth;

(d) business operations conducted under the supervision of the Governor of the Panama Canal by various business units of the Panama Canal and Panama Railroad Company;

and to recommend to the Congress concerning what elements of cost should be properly used in the future as the base of a policy to be followed in establishing and levying tolls for the use of the Panama Canal for transit purposes.

The President was requested to—

defer until after the submission of the committee's report any change in the tolls currently levied for use of the Panama Canal.

The effective date of the increase was postponed until April 1, 1949, and again, at the request of the committee, until September 1, 1949.

Pursuant to the authority conferred by House Resolution 44, a special subcommittee of the House Merchant Marine and Fisheries Committee to investigate Panama Canal tolls conducted a study and issued an interim report (H. Rept. No. 1304, 81st Cong., 1st sess.) on August 23, 1949. The subcommittee found that—

> the toll question is intimately linked to the administration, operation, and accounts of the Canal. The appropriate toll policy can hardly be decided upon and administered without business-type accounts, similar to those of public utilities, upon which to rely for basic financial and operating data. * * * It is believed to be impossible to arrive at any satisfactory conclusion until the Canal functions have been placed either within the Panama Railroad Company or in a separate corporation with an appropriate type of accounting which segregates defense measures from commercial capital costs and operating expenses on the basis of appropriate legislative allocation.

The subcommittee recommended:

1. That the President be requested to cause a study to be made of the organizational aspects of all phases of the Panama Canal; including the Panama Railroad, and that his recommendations of suitable changes be furnished to the Congress. Inasmuch as the problem has recently been considered by the General Accounting Office and the Bureau of the Budget, it is believed that this study may be concluded within the present calendar year, and in any event not later than January 31, 1950.

2. That in the meantime the pending Proclamation No. 2775 be withheld until a decision is reached as to the final organization of the Panama Canal.

In compliance with the subcommittee's recommendation, the effective date of the proclamation was postponed until April 1, 1950. The President directed the Director of the Bureau of the Budget by letter of August 25, 1949, to undertake the study requested by the subcommittee.

Organization of the Panama Canal and the Panama Railroad Company

The primary mission of the Panama Canal and related Government business enterprises in the Canal Zone is to operate and maintain a waterway by means of which vessels may make the transit from one ocean to another. The accomplishment of this mission involves three general types of activities:

(1) Operation, maintenance and protection of the Canal itself;

(2) Operation of various auxiliary business enterprises necessary to provide for the needs of shipping and Canal employees and essential to the efficient and economical operation of the Canal; and

(3) Administration of the government of the Canal Zone.

[fol. 82] Administration of these activities is the function of the Panama Canal and its business adjunct, the Panama Railroad Company, a wholly owned Government corporation.

The Panama Canal is responsible for the operation and maintenance of the Canal and the government, sanitation, and protection of the Canal and Canal Zone. Administration of the various auxiliary business enterprises is divided between the Panama Canal and the Panama Railroad Company. The 18 so-called "business divisions," the clubhouse division and the Bureau of Posts of the Panama Canal are responsible for mechanical, marine, and electrical-repair work, building construction and maintenance, quarters for employees, storehouses and ship chandlery, oil-handling facilities, gasoline stations, gravel plant, Sosa Hill quarry, Panama Canal press, motor transportation, municipal work, water system, electric-power system, theaters, restaurants, small retail stores and postal service. The Panama Railroad Company operates the trans-Isthmian railroad, a steamship line between New York and the Canal Zone, coaling plants, telephone system, receiving and forwarding agency, hotels, wholesale warehouses, cold storage plants, laundry, dairy, manufacturing plants, and retail stores.

The Panama Canal is at present an independent agency headed by a Governor appointed by the President by and

with the advice and consent of the Senate. Although the President has delegated general supervisory authority over the Panama Canal to the Secretary of the Army, the agency is not legally a part of the Department of the Army or the Department of Defense. In time of war in which the United States is engaged, or when in the opinion of the President war is imminent, the President is authorized to designate an officer of the Army to exercise exclusive authority and jurisdiction over the operation of the Canal and its adjuncts. The President took such action by issuing Executive Order No. 8232 on September 5, 1939. This order still remains in effect.

Management of the Panama Railroad Company is vested in a Board of Directors consisting of not less than 9 and not more than 13 persons selected by the President or such officer of the United States as he may designate as "stock holder." The Governor of the Panama Canal is ex officio a Director and President of the corporation. The Secretary of the Army has been designated by the President to act as "stockholder" and thus supervises both the Railroad Company and the Canal.

The Panama Canal and the Panama Railroad Company constitute a single administrative entity. The Governor, engineer of maintenance, and many of the heads of both staff and operating units act in a dual capacity as officials of the Canal and officers of the corporation.

Inflexibility of the Organization

The organization of the Panama Canal is characterized by a high degree of inflexibility, which has made more difficult adjustments dictated by the increased complexity of its operations and by changes in program emphasis or commercial conditions. The transition of the Canal from a vast construction project to a multi-million-dollar-business operation has not been reflected by any changes in its basic over-all organization which remains the same today as [fol. 83] it was when the Panama Canal was established 36 years ago as the successor to the Isthmian Canal Commission. The same is true of its internal organization which, with some minor modifications, conforms to the provisions of Executive Order No. 1885, issued by President Wilson in 1914.

There is no single cause of this inflexibility. It is the product of a combination of factors including geographical isolation from the United States, environment, monopoly character of the operations, and restrictions on the Governor's authority to reorganize. Some of these can be remedied or alleviated, but others are inherent in the Canal's location and mission.

The operations on the Isthmus are largely self-contained and have little direct contact with current conditions in the United States. Notwithstanding the development of rapid communications and modes of travel, employees of the Canal soon lose contact both with their friends and job opportunities in the States. If an employee is discharged, he and his family must leave the Zone within 30 days. He not only loses a job, but must leave his home and friends as well. This condition has tended to reduce normal turn-over and has constituted a serious obstacle to the recruitment of new personnel. Crystallization of tradition and the development of a general resistance to change are the inevitable consequences of isolation.

Treaty obligations as well as administrative and strategic considerations make it essential that all of the major business operations in the Canal Zone be conducted as Government monopolies. Consequently, competition cannot be relied upon as a stimulus to promote efficiency and progress. In a sense this is also true of the Canal's governmental activities for they are not readily comparable to like activities in the United States.

Despite the fact that the Governor is responsible for the efficient operation of the Canal, his authority to make such changes in internal organization as may be necessary to promote efficiency is limited. Executive Order No. 1885 prescribes in detail the organization of the Panama Canal and its adjuncts. A memorandum accompanying the Executive order earmarks many of the top administrative positions for various branches of the armed services, thus restricting the Governor's freedom in selecting his principal subordinates. The Governor's authority extends only to assigning duties to subunits within major departments and offices and transferring, with the approval of the President, specific duties from one department or office to another. At the present time any major reorganization would require either Presidential action or approval.

The necessity of adjusting a dynamic program to a static organization has meant that organization problems have been dealt with on a patchwork basis. While through the the years organizational relationships and duty assignments have been altered, yet titles and organizational groupings have not been modified to conform to actual practice and in many instances are misleading or meaningless.

Over the past several years the governors of the Panama Canal have been increasingly concerned by the failure of the existing organization to meet adequately present-day operating conditions and the complexities that have developed in the conduct of the Canal's business. Studies of the Canal's entire organization were initiated by Gov. F. K. Newcomer early in 1949 and plans for a general reorganization have reached an advanced stage.

[fol. 84] Complexity of Financial Administration

Management of the Panama Canal and its adjuncts is further complicated by the variety of policies and statutory requirements applicable to the financial operations of the various enterprises. The Panama Railroad Company, the Canal, the business divisions, the postal system and clubhouses, and the civil government of the Canal Zone are each administered under a somewhat different set of standards and regulations. Significant differences are found in sources and use of funds, accounting, and budgeting and audit procedures.

a. Sources and use of funds

The Panama Railroad Company is completely self-supporting. Its business activities are financed out of revenues, and the corporation is required to pay into the Treasury as dividends any amounts in excess of its necessary working capital requirements and its reasonably foreseeable requirements for plant replacement and expansion. The corporation has business-type flexibility with respect to its expenditures which are subject only to laws applicable to Government corporations.

The Panama Canal is also authorized to use receipts to finance its business operations, but is subject to two requirements not applicable to the Panama Railroad Company: (1) The aggregate net profit if any accruing from the con-

duct of such business operations shall annually be covered into the Treasury of the United States; (2) such receipts shall be subject to the provisions of law relating to public funds of the United States. The effect of the latter provision is to reduce flexibility and to subject the business operations of the Canal to all of the regulatory and prohibitory statutes applicable to governmental type programs.

The postal system, clubhouses, and transiting of ships through the Canal are handled differently than the other business operations. Expenses of operating the Canal Zone postal service are defrayed from its revenues, and such revenues are appropriated, without limitation as to time or amount, for that purpose. The clubhouses are completely self-supporting at the present time. Clubhouse funds fall in a special category and do not have the legal status of appropriated funds. Neither the postal service nor the clubhouses are required to pay dividends or net profits into the Treasury.

The Canal is not authorized to utilize its principal source of income, revenues from tolls. The statutes require that revenues from tolls and civil revenues shall be covered into the Treasury of the United States. The maintenance and operation of the Canal together with civil government, health, and sanitation are financed by funds appropriated by the Congress.

b. Accounts, budget and audit

As a wholly owned Government corporation, the Panama Railroad Company is in a position to conduct its operations in a businesslike manner. It is subject to the Government Corporation Control Act of 1945 and enjoys the benefit of the business-type budget, audit, and accounting procedures prescribed by that act. Its accounts are designed not only to furnish the types of basic data required by management in the conduct of a business, but also to reveal accurately the financial results of its operations. The General Accounting Office has found that "the accounts of the Panama [fol. 85] Railroad Company have been well maintained and supervised." The corporation submits annually a business-type budget for review by the President and the Congress, and its financial transactions are audited each year by the General Accounting Office "in accordance with the princi-

ples and procedures applicable to commercial corporate transactions."

On the other hand, the Panama Canal, as a noncorporate agency coming under the provisions of the Budget and Accounting Act of 1921, must conduct all of its business operations, except the clubhouses, in accordance with rules and procedures designed to control programs of a noncommercial character. Accounts are maintained in accordance with statutory rules and regulations and principles of appropriation and fund accounting prescribed for governmental bodies. However, the business nature of many of the activities has necessitated adaptations in the accounting system to meet some of the basic requirements of a business operation. The result of existing laws and regulations is a hybrid governmental-commercial accounting system which is far from satisfactory. The General Accounting Office has criticized the accounts produced under this hybrid system as, in most cases, falling—

far short of the kind of factual determination and presentation of revenues, costs and expenses, and net profits (or losses) necessary for accurate reporting and as an effective tool for management control.

Similarly, the governmental-type budget submitted by the Panama Canal is not designed to furnish adequately the types of basic data essential to the satisfactory evaluation and control of a business operation. Furthermore, there is no independent commercial-type audit of the accounts of the Panama Canal. Disbursement vouchers are submitted by the Canal to the General Accounting Office in Washington and are audited for the purpose of checking the legality of expenditures. The audit by the General Accounting Office on the Isthmus is primarily restricted to an examination of receipts. Neither the voucher audit in Washington nor the audit of receipts on the Isthmus is designed to disclose fully the financial condition of the Canal and the financial results of its operations.

The net effect of current laws and procedures is to require that the Panama Railroad Company and the Panama Canal, two integral parts of a single enterprise, be operated as if one were strictly business and the other strictly governmental. Yet there would appear to be no valid basis for

distinguishing between a business operation conducted by the Panama Railroad and a comparable operation under the Panama Canal. It would be extremely difficult, for example, to discover a significant difference between a Panama Canal storehouse and a Panama Railroad commissary, both of which are engaged in the business of selling commodities. Business-type accounts, budget, audit, and financial flexibility are essential to the successful conduct of the affairs of the Panama Railroad Company and certainly are no less desirable in the case of the Panama Canal's business operations.

The way has now been opened to clarify the present anomalous situation. Public Law 808 (80th Cong.) authorizes the Panama Railroad Company to undertake any of the business operations now performed by the Canal, except operation of the Canal itself, and Public Law 223 (81st Cong., 1st sess.) authorizes the President to transfer certain or all of such activities to the corporation. Pursu- [fol. 86] ant to the direction of the President, Governor Newcomer submitted on November 18, 1949, recommendations for certain initial transfers. Additional legislation would be required to authorize the President to transfer the Canal operation to the corporation.

Tolls Policy

The treatment of the Panama Railroad Company and the Panama Canal as separate entities for financial and accounting purposes has not provided a clear basis for a sound tolls policy. Although the 1937 Special Committee on Panama Canal Tolls and Vessel Measurement recommended that in considering expenses and revenues the Canal and its adjuncts, including the corporation, should be regarded as a single enterprise, this practice has not been followed.

Under the existing formula, revenues from tolls, together with profits from the Canal's business operations and miscellaneous revenues from licenses, fines, etc., are expected to produce an amount sufficient to cover operating expenses of the Panama Canal (including civil government, health, and sanitation), and a 3-percent return on the capital investment. Neither the revenues nor the expenses of the corporation are included in the tolls base.

Consequently the Canal would now automatically lose the benefit of the profits of any business activity transferred from it to the corporation. This fact has naturally led to opposition by the shipping industry to any such transfers.

No uniform pattern has been established for allocating to the corporation its share of the cost of civil government, health, and sanitation. The corporation is required to pay for hospitalization of its employees (but not out-patient care and dispensary service), garbage collection, police and fire protection of its own facilities, but it contributes nothing toward the upkeep of municipal police and fire portection, the Canal Zone school system, cemeteries, streets, highways, and sewers. The cost of the latter services is borne entirely by the Panama Canal. The corporation does bear its full share of the costs of overhead administration, such as the Governor's office, accounting department, etc.

The most controversial aspects of tolls policy are (1) the interest charge on the capital investment; and (2) the question of whether any of the costs of constructing, operating, and maintaining the Canal should be allocated to national defense.

The principal that Federal business enterprises should pay a rate of return on the Government's investment equal to the cost of the money to the Treasury is now well settled. The President recommended in his 1948 budget message that "Corporations should be required to reimburse the Treasury for the full cost of the money advanced to the corporation." There is no reason why the Panama Canal and its adjuncts should be exempted from payment of interest since they are essentially Federal business enterprises. However, at current average long-term rates the Panama Canal would be required to pay interest at the rate of approximately 2.3 rather than 3 percent.

Whether any part of the capital costs of the Canal should be allocated to national defense presents a problem to which there is no positive answer. The Canal admittedly does serve a dual purpose—defense and commerce. However, [fol. 87] any attempt to establish which purpose was primary at the time the Canal was built would be an utterly fruitless undertaking. An equal number of statements on

either side can be found, often by the same individual, to support whatever conclusion one wants to reach.

Studies made by the Bureau of Efficiency in 1931 and by the special committee in 1937 determined that no major part of the capital costs of the Panama Canal should be allocated to national defense. The only additional feature of the Canal which might not have been included if it had been constructed exclusively for commercial use is the increase in the width of the locks from 100 to 110 feet. Actually the additional width has been an important factor in facilitating the approach to, and handling of commercial vessels in, the locks. There would appear to be no significant added costs in the construction of the Canal attributable solely to national defense.

The subsidy to national defense comes not from a failure to allocate capital costs but from the fact that military and other Government vessels do not pay tolls. While a record is maintained of such free transits, no allowance is made for them in the tolls base. This policy stems from an interpretation of an Attorney General's opinion in 1915. That interpretation need not be controlling for, while the Attorney General did hold that free transits would not constitute a treaty violation, he did not rule that it would be illegal either to require the payment of tolls by Government vessels, or to credit them in the tolls base.

The cost of transiting a military vessel through the Canal is just as much a national-defense cost as the cost of operating the vessel itself. It is in no sense an essential part of the cost of operating and maintaining the Canal. Yet the cost of free transits is now included with the other costs which the commercial user of the Canal is expected to meet by the payment of tolls. While during the period from 1921 to 1939 free transits have averaged 4.1 percent of total Canal tolls, during what may be considered the war years (1940-45) the volume of free transits averaged 26.2 percent, and in 1945 reached 64.5 percent. The total amount of free tolls from 1921 to 1949 amounted to $64,194,574.

The military pay for most of the other services which they obtain from the Panama Canal, such as hospitalization, water, electricity, garbage collection, etc. The only major item of this type for which the military do not pay is the school facilities for children of military personnel and

civilian personnel employed by the military. Over 45 percent of the school poulation of the United States rate—schools at the present time consists of children whose parents are members of the armed forces or employed by the Army, Navy, or Air Force.

The Coast Guard reimburses the Panama Canal for the maintenance of two of the most distant offshore lighthouses, but the Canal meets the cost of the other offshore lighthouses.

To look at the other side of the picture, the Canal receives certain services from the military without reimbursement. These consist principally of Army and Navy personnel assigned to duty with the Canal. Salaries paid by the military to such employees of the Canal amount to approximately $430,000 per annum.

[fol. 88] Supervision of the Panama Canal and Panama Railroad Company

Supervision of the Panama Canal and the Panama Railroad Company has been vested from the very beginning in the Secretary of War and his successor, the Secretary of the Army. President Theodore Roosevelt's letter of May 9, 1904, cites two principal reasons for requesting the Secretary of War to act as his representative in supervising the construction of the Canal and the government of the Canal Zone:

(1) the War Department is the Department which has always supervised the construction of the great civil works for improving the rivers and harbors of the country and the extended military works of public defense; (2) the War Department has from time to time been charged with the supervision of the government of all of the island possessions of the United States, and continues to supervise the Government of the Philippine Islands.

Neither of these reasons would apply with equal force today. Construction has become incidental to the maintenance and operation of the Canal. The War Department is no longer the agency which supervises the government of our island possessions. Reorganization Plan No. II of 1939 transferred all remaining functions of the War De-

partment's old Bureau of Insular Affairs to the Department of the Interior.

Excellent reasons existed for not considering any change with respect to the Panama Canal at the time when the War Department was relieved of its remaining responsibilities over Territories and possessions in 1939. It was in September of that year that the President found it necessary [fol. 89] to invoke the provisions of the Panama Canal Act by placing the Canal under the direct command of the Army. To have placed the Canal under any official other than the Secretary of War in 1939 and the ensuing war years would have been illogical and resulted in a divided command.

When Executive Order No. 8232 is rescinded, however, the organizational status of the Panama Canal and the Panama Railroad Company should be reappraised. The intent of the Panama Canal Act that in peacetime the Canal and its adjuncts should be under civilian control is unmistakable. The Canal itself, which has been aptly described as a great international public utility, is fundamentally a commercial waterway for international commerce. Operation of a vast commercial enterprise such as the Canal and its adjuncts and the civil government of the Canal Zone is not necessary for the performance of the basic mission of the Department of Defense.

At the policy level the programs of the Panama Canal and the Panama Railroad Company have their most significant impact in the transportation area. Actions taken by the Canal may vitally affect not only world trade and shipping but also intercoastal trade and transcontinental railroads. The question of tolls rates, for example, raises important issues which should be reviewed in the light of the objectives of national transportation policy. Neither the Secretary of Defense nor the Secretary of the Army has at the present the departmental responsibility or the staff resources to deal adequately with policy issues of this character. Military-staff channels are not and should not be used for this purpose. In the absence of other staff facilities, the Secretary of the Army has been compelled to rely almost exclusively on his administrative assistant, who has numerous other important duties, and the Washington Office of the Panama Canal for assistance on Panama Canal matters.

Establishment of a special Panama Canal staff in either the Office of the Secretary of Defense or the Secretary of the Army would offer only a partial solution to the problem and might well further complicate coordination of transportation policy. The Commission on Organization of the Executive Branch of the Government recommended that—

there be established in the Department of Commerce a grouping of all major non-regulatory transportation activities of the Federal Government.

The Panama Canal would clearly come under the Commission's definition of a "transportation activity." Since the Secretary of Commerce is to be charged with coordination of transportation policy, it would be an entirely logical step to transfer to him supervisory authority over the Canal and its adjuncts.

The working out of a satisfactory relationship between the Canal and the armed forces on the Isthmus does not require that they report to the same department head. A clear-cut separation of civilian and military functions has already been accomplished in such highly strategic areas as Guam and the American zone of Germany. In some respects a separation would simplify the solution of differences between the two agencies. The Governor under existing arrangements operates at a serious disadvantage when he attempts to persuade the Secretary of the Army to overrule his military advisers. Often the best he can hope for is no action. Some of these questions could undoubtedly be settled more expeditiously by across-the-board [fol. 90] discussions between the Secretary of Commerce and the Secretary of Defense. It would only be on rare occasions that unresolved issues would have to be taken to the President.

Suggestions that the Canal be included in a Department of Overseas Affairs fail to recognize the unique status of the Canal and the Canal Zone. There are significant differences between the Canal Zone and other Territories and possessions. The Canal Zone is unique both as to the purposes for which it was acquired and is maintained by the United States and its status under governing treaties and laws. It is essentially a United States Government reservation devoted to the purposes of the maintenance, oper-

ation, sanitation, and protection of the Panama Canal and its auxiliary works.

[fol. 91] Recommendations

The record of achievement of the Panama Canal both in peace and in war is one in which the Nation may well take pride. This record can be maintained and surpassed, however, only by modernizing or replacing obsolete organizational machinery. It is believed that implementation of the following recommendations will result in a more logical grouping of functions, provide a sounder basis for determining toll rates and other charges, facilitate operations, and, in general, promote the more effective administration of the Panama Canal enterprise.

1. It is recommended that all of the functions of the Panama Canal, except those relating to civil government, health and sanitation, be transferred to the Panama Railroad Company and the Company's name changed to the Panama Canal Company; the name, the Panama Canal, should be changed to Canal Zone government.

The Commission on Organization of the Executive Branch of the Government recommended that—

straight-line business activities be incorporated so as to secure greater flexibility in management and simpler accounting, budgeting, and audit methods.

Transfer of the Panama Canal business operations and clubhouses, together with the Canal itself, to the Panama Railroad Company is wholly consistent with the objective set by the Commission.

Within recent years it has been increasingly recognized that financial controls generally applicable to government-type programs, such as civil government, health and sanitation, cannot satisfactorily be employed in the case of programs which are essentially of a business nature. This is reflected by the enactment in 1945 of the Government Corporation Control Act, which provides for new types of controls, such as the business-type budget and commercial-

type audit, specially designed to meet the needs of programs of a business character.

The grouping together of all business activities in the Panama Canal Company and all governmental activities in the Canal Zone government will insure that each will operate under the appropriate type of controls. The attempt to operate the business activities of the Panama Canal under procedures, accounting methods, and controls [fol. 92] devised for nonbusiness programs is a major source of current complexities in financial administration.

The operation and maintenance of the Canal itself is no less of a business operation than the other activities now defined by the Panama Canal as "business operations." It is revenue-producing, expected to be self-sustaining, and requires considerable operating flexibility. As the 1937 special committee noted in its report:

> the Panama Canal and its auxiliary adjuncts constitute a business enterprise that may be properly made self-supporting.

In accordance with the provisions of the Panama Railroad Company charter (Public Law 808, 80th Cong.), the Government investment in the Panama Canal Company, subject to interest, would consist of the appraised value of the net assets transferred to the Company from the Panama Canal, less repayments as dividends or otherwise by the Panama Railroad Company in excess of the original Government investment therein. The investment would be increased by any subsequent additional investments of Government funds or other assets, or reduced by repayments to the Treasury and extraordinary expenditures and losses incurred through national policy and not related to the Company's operations. The Company would be required to pay interest to the extent of its ability on the net direct investment in the Company—

> at a rate or rates determined by the Secretary of the Treasury as required to reimburse the Treasury for its cost.

The Company should reimburse other Government agencies for goods and services it receives, including the payment of salaries of military personnel, and should be

compensated for any services it furnishes to other agencies. Only in this way can a completely accurate picture be obtained of the financial results of its operations. Sales or services between divisions of the Company, or between the Company and the Canal Zone government, should be charged as nearly as possible at the cost of producing such goods or services, excluding interest and the Company's share of the cost of civil government. Sales and services to all others, including Government agencies, should be at prices over cost which may reasonably be expected to cover, in the aggregate, the interest on the Government's investment and the Company's share of the expense of civil government and related activities. Free transits of United States Government vessels would be eliminated.

Inasmuch as the Company will not pay taxes, which it would be required to do if it were a private corporation, it should be expected in lieu of taxes to bear the net expense of civil government, health, and sanitation. This expense would be assessed against the total enterprise, rather than exclusively against the tolls as under the existing system. One method of distributing such costs among various elements of the enterprise would be on the basis of gross revenues. This method has the merit of simplicity and the merit, also, of recognizing changes in the going-concern value of the enterprises.

The Company would operate primarily from revenues and should be authorized to utilize all of its revenues, including revenues from tolls, in the conduct of its business. The present practice of paying tolls into miscellaneous receipts is not necessary to provide adequate control over the use of such funds. Adequate control can be secured [fol. 93] through the business-type budget, which all corporations must submit annually to the President and the Congress, and the commercial-type audit by the General Accounting Office. To take care of any sudden drop in business due to changes in economic conditions, appropriations to the corporation to cover losses should be authorized.

The Canal Zone government, as the agency charged with exclusively governmental functions, should be financed by an annual appropriation from the Congress. However, the costs of operation in the long run should be recovered

from (1) charges for services, such as school tuition, license fees, fines, etc.; (2) charges to the armed forces for facilities used by their personnel, primarily schools and hospitals; and (3) payment by the Company of the remaining balance. Since the Canal Zone government would be a noncommercial agency, no payment of interest on the Government's investment should be required, but the costs should include depreciation, and the reimbursement of other Government agencies for expenditures made on its behalf. All collections by the Canal Zone government, including payments by the Company, should be covered into the Treasury as miscellaneous receipts. The Canal Zone should adopt accrual methods of budgeting, accounting, and reporting so that its financial statement will be consistent with those of the Company.

Consideration was given to the merger of all of the activities of the Panama Canal and the Panama Railroad company in a single corporation. While such an arrangement would have the virtue of simplicity, it would continue the present intermingling of business and governmental functions. More important perhaps is the fact that the Governor has certain statutory functions as the representative of the President of the United States on the Isthmus which it would be entirely inappropriate to vest in a corporation president serving under a board of directors. Examples of such functions include dealings with the Republic of Panama, the issuance of exequators to foreign consuls, the extradition of fugitives from justice, the granting of pardons and reprieves, the issuance of various regulations and ordinances and similar functions normally vested in a chief of state. Under the proposed reorganization, the Governor would continue to act in a dual capacity as Governor and president of the corporation.

It was also found that there was no necessity of creating a new corporation. Public Law 808 (80th Cong.), the charter of the Panama Railroad Company, affords a satisfactory instrument for performing the additional functions to be conferred upon the corporation. Amendments to this act will re required, however, to authorize the corporation to operate and maintain the Canal and utilize revenues from tolls. Additional amendents will be needed to au-

thorize appropriations to cover losses and to change the corporation's name. The name Panama Railroad Company has historical value but it has long ceased to be descriptive of the corporation's many varied activities. It is also proposed that the name the Panama Canal be changed to Canal Zone government.

In summary, it is believed that the proposed reorganization will—

(a) For the first time present a complete picture of the Government's investment in the Panama Canal enterprise and the results of its operations;

[fol. 94] (b) Make possible more efficient operation of the various commercial enterprises by the introduction of business-type budgeting, accounting, and reporting methods together with essential operating flexibility;

(c) Provide a more equitable basis for levying tolls and other charges through proper allocation of the costs of operating and maintaining the Canal and its related enterprises.

Satisfactory accomplishment of such a reorganization will take time and make mandatory the strengthening of staff facilities now available to the Governor. Approximately 1 year would be required to convert the existing organization to the new basis.

2. It is recommended that authority to determine the internal organization of the Panama Canal be delegated to the Governor of the Panama Canal.

The Commission on Organization of the Executive Branch of the Government recommended that a department head "should be given authority to determine the organization within his department." Much of the inflexibility of the present Panama Canal organization stems from the fact that the Governor does not possess such authority. Executive Order No. 1885, together with the accompanying memorandum of the President, should be rescinded and the authority to determine internal organization delegated to the Governor.

3. It is recommended that the Board of Directors of the Panama Canal Company be authorized to establish tolls rates, subject to the President's approval.

The present basis of establishing tolls rates does not lend itself to the ready adjustment of rates, either up or down, to reflect increases or decreases in costs or changes in commercial conditions. While the President is authorized to prescribe and from time to time change the tolls to be levied for use of the Panama Canal, he must give 6 months' notice of such changes by proclamation and cannot raise the rate above $1 per net vessel-ton for laden vessels. It is significant that the tolls rates have not been changed under this formula since 1938.

Provided that there is agreement as to the formula for establishing the tolls rates and adequate business-type accounts and financial reporting, the actual setting of the tolls rate becomes almost a ministerial function which could well be delegated to the corporation's board of directors. However, since the tolls rate may have an effect on national transportation policy, review and approval of the rate by the President is essential.

While the tolls rate should not be changed on a year-to-year basis since 1 year's experience is insufficient to reflect accurately long-range trends, the rate should be adjusted periodically as changes take place in the factors that determine the charges that should be made for the use of the Canal. As the 1937 special committee expressed it:

Economic and commercial conditions are not static. The Panama Canal is a facility for the service of interoceanic commerce. The charges for the service should receive such adjustments from time to time as will keep the charges in harmony with the needs of the Canal and the requirements that must be met in making the Canal the servant and assistant of international intercourse.

[fol. 95] 4. It is recommended that responsibilty for supervision of the Panama Canal and the Panama Railroad Company be transferred from the Secretary of the Army to the Secretary of Commerce

The Panama Canal and the Panama Railroad Company should be included with the other major nonregulatory

transportation agencies which the Commission on Organization of the Executive Branch of the Government has recommended be grouped together under the Secretary of Commerce. It is essential that Panama Canal policies be coordinated with the objectives of national transportation policy and such coordination can best be achieved through supervision by the Secretary of Commerce. Staff facilities already exist in the Department of Commerce which could be developed to furnish necessary assistance to the Secretary of Commerce in fulfilling his supervisory responsibility with respect to the Panama Canal enterprise. Such facilities do not now exist in the Department of the Army and the Department of Defense and military staff cannot satisfactorily be employed for this purpose.

In addition, the Department of Commerce is constantly engaged in studying business-management problems and is consequently in an excellent position to provide valuable assistance to the corporation in its conduct of the many varied commercial enterprises on the Isthmus.

The historical reasons for placing the Panama Canal under the Secretary of War's supervision no longer apply. The construction stage of the Canal's operation has long since been completed, and the Department of the Army is no longer the agency charged with the responsibility for government of Territories and island possessions.

In time of war or when war is threatened, the Panama Canal could be placed under military supervision and control as is now provided by the Panama Canal Act.

The timing of the transfer of supervisory responsibility to the Secretary of Commerce is dependent upon what action is taken with respect to Executive Order No. 8232, which places the Canal and its adjuncts under military control.

5. It is recommended that early consideration be given to the revocation of Executive Order No. 8232

Assessment of military requirements with respect to the defense of the Canal is obviously beyond the scope of the present study. Continuance in effect of Executive Order No. 8232 would appear, however, to be in conflict with spe-

cific provisions of the Panama Canal Act, and justification for its continuance should be explored promptly.

Frank Pace, Jr., Director.

[fol. 96] EXHIBIT "D" TO MOTION

MAINTENANCE AND OPERATION OF THE PANAMA CANAL

Hearing Before a Subcommittee of the Committee on Armed Services, United States Senate, Eighty-first Congress, Second Session on H. R. 8677

An Act to Authorize and Provide for the Maintenance and Operation of the Panama Canal by the Present Corporate Adjunct of the Panama Canal, as Renamed; to Reconstitute the Agency Charged with the Civil Government of the Canal Zone, and for Other Purposes

September 1, 1950

Printed for the use of the Committee on Armed Services

[fol. 97] MAINTENANCE AND OPERATION OF THE PANAMA CANAL

Friday, September 1, 1950

United States Senate, Subcommittee of the Committee on Armed Services, Washington, D. C.

The subcommittee met, pursuant to call, at 1:40 p. m., in room 212, Senate Office Building, Senator Harry Flood Byrd (comprising a subcommittee of one) presiding.

Present: Senator Byrd.

Also present: Justice M. Chambers of the committee staff.

Senator Byrd. The meeting will come to order.

This is a subcommittee appointed to consider H. R. 8677, a copy of which is placed in the record at this time.

[fol. 98] Senator Byrd. As I understand it, this bill is primarily designed to improve the cost-accounting procedures of the Panama Canal for the purpose of providing a more accurate method of determining and adjusting tolls.

I notice Congressman Fugate, of Virginia, is here in the room. Does Congressman Fugate desire to make a statement?

Mr. Fugate. I do not desire to make a statement. There are others here who are prepared and will make a statement on the bill.

Senator Byrd. I know of your great interest in this.

Mr. Seidman, of the Bureau of the Budget, will be the first witness.

Statement of Harold Seidman, Accompanied by Russell Roane, Representing the Bureau of the Budget

Mr. Seidman. Mr. Chairman, the President on January 31, 1950, transmitted to the Congress a report of the Bureau of the Budget and his recommendations with respect to the organization and operations of the Panama Canal and the Panama Railroad Company. The report and recommendations were prepared pursuant to House Report No. 1304, [fol. 99] Eighty-first Congress, first session, which requested the President—

to cause a study to be made of the organizational aspects of all phases of the Panama Canal, including the Panama Railroad, and that his recommendations of suitable changes be furnished to the Congress.

The President's recommendations may be briefly summarized as follows:

1. All of the business operations of the agency known as the Panama Canal, including the operation and maintenance of the waterway, should be transferred to the Panama Railroad Company whose name should be changed to "Panama Canal Company."

2. The Panama Canal, under the new name of "Canal Zone Government," should continue to administer functions which are basically of a governmental nature such as health, sanitation, education, police and fire protection, etc. The Governor, as under present arrangements, would serve

in a dual capacity as both the head of the Canal Zone Government and President of the Panama Canal Company.

3. The proposed Panama Canal Company should reimburse other Government agencies for goods and services it receives, and be compensated or receive credit for any services it renders to other agencies, including the cost of transiting military and Government vessels through the Canal.

4. The Board of Directors of the proposed Panama Canal Company should be authorized to establish toll rates, subject to the President's approval.

H.R. 8677, as approved by the House of Representatives, is fully in accord with the President's recommendations, except for amendments to section 14 providing that (1) the rate of tolls on laden vessels shall not exceed $1 per net vessel ton; and (2) capital investment for interest purposes shall not include any interest during construction.

The Commission on Organization of the Executive Branch of the Government recommended that—

straight-line business activities be incorporated so as to secure greater flexibility in management and simpler accounting, budgeting, and audit methods.

By providing for the transfer of the Panama Canal business operations, together with the Canal itself, to the Panama Canal Company, H. R. 8677 is wholly consistent with the objective set by the Commission.

Within recent years it has been increasingly recognized that financial controls generally applicable to Government-type programs, such as civil government, health and sanitation, cannot satisfactorily be employed in the case of programs which are essentially of a business nature. This is reflected by the enactment in 1945 of the Government Corporation Control Act, of which Senator Byrd was the coauthor, which provides for new types of controls, such as the business-type budget and commercial-type audit, specially designed to meet the needs of a programs of a business character.

I might add that Congress within the week again recognized the necessity of distinguishing between financial controls of business programs and those over the ordinary

governmental spending type of program by excluding corporations from the jurisdiction of the Budget and Accounting Procedures Act of 1950, so that they will continue to be under the Government Corporation Control Act. [fol. 100] The grouping together of all business activities in the Panama Canal Company and all governmental activities in the Canal Zone government will insure that each will operate under the appropriate type of controls. The attempt to operate the business activities of the Panama Canal under procedures, accounting methods, and controls devised for nonbusiness programs is a major source of current complexities in financial administration.

The result of existing laws and regulations is a hybrid governmental-commercial accounting system which is far from satisfactory. The General Accounting Office has criticized the accounts produced under this hybrid system, as, in most cases, falling

far short of the kind of factual determination and presentation of revenues, costs and expenses, and net profits (or losses) necessary for accurate reporting and as an effective tool for management control.

The organizational arrangements contemplated by H. R. 8677 have already been approved, in large measure, by the Congress. Public Law 808 (80th Cong.) authorized the Panama Railroad Company to undertake any of the business operations now performed by the Panama Canal, except operation of the Canal itself, and Public Law 223 (81st Cong.) authorized the President to transfer certain or all of such activities to the Corporation. Several transfers have been made pursuant to this authority.

The record of the Appropriations Committee on the 1951 supplemental appropriation bill recommends that all of the housing activities of the Canal Zone be transferred to the Company.

The operation of the waterway is certainly no less of a business operation than those activities which the Congress has already authorized the President to transfer to the Corporation. It is revenue-producing, expected to be self-sustaining, and requires considerable operating flexibility. The transfer of the Canal to the Panama Canal Company, in accordance with the provisions of the present bill, is a

logical sequel to the transfers authorized by the earlier enactments.

The Panama Canal Company, like the present Panama Railroad Company, would be expected to operate primarily from its revenues and would be authorized to utilize all of its revenues in the conduct of its business. The present practice of paying tolls into miscellaneous receipts is not necessary to provide adequate control over the use of such funds. Adequate control can be secured through the business-type budget, which all corporations must submit annually to the President and the Congress, and the commercial-type audit by the General Accounting Office. The commercial-type audit will have the added advantage of making available to the Congress and the public for the first time a complete picture of the Government's investment in the Panama Canal enterprise and the results of its operations.

In addition to carrying out the President's recommendations with respect to organization, H. R. 8677 makes a number of important changes both in the procedures followed in prescribing tolls and in the formula employed in determining toll rates. The act of August 24, 1937, amending the Panama Canal Act, authorizes the President to set Panama Canal tolls at a rate not to exceed $1 per ton for laden ships. Six months' prior notice of an increase is required. No formula is established by the 1937 act to guide the President in adjusting the toll rates.

[fol. 101] H. R. 8677 provides that the Panama Canal Company shall prescribe the toll rates in accordance with a formula established in section 14 of the bill, subject to the President's approval. The Company, as under present law, would be required to give 6 months' prior notice of any proposed changes in rates, and, in addition, to conduct a public hearing on the proposed changes.

If there is agreement as to the formula for establishing the toll rates and adequate business-type accounts and financial reporting, there is no sound reason for not delegating the rate-making function to the Company's Board of Directors, as has been done in the case of other Government corporations, such as TVA, which set the rates to be charged for their services.

My recollection is in the testimony before the House committee there was pretty general agreement, both by industry and Government, as to the fairness of the formula set forth in the bill.

There are two important safeguards provided in the bill. The first is the requirement for a public hearing and the second for Presidential approval. Since tolls may have an effect on national transportation policy, review and approval of the rate by the President is believed essential. The Congress will, of course, have an opportunity to examine tolls policy in connection with its review of the business-type budget to be submitted annually by the Company.

Under the existing formula, revenues from tolls, together with profits from the Canal's business operations and miscellaneous civil revenues, are supposed to produce an amount sufficient to cover:

1. A 3-percent return on a capital investment of approximately $534,000,000 in the Panama Canal, including the investment in civil government, health and sanitation facilities. (This is a book figure and interest is not actually paid to the Treasury.)
2. The costs of operating and maintaining the Canal.
3. The net cost of civil government, health, and sanitation, including the cost of school facilities provided for children of military personnel and personnel employed by the military.
4. The cost of transiting military and Government vessels through the Canal.

The objective of the present formula has not been achieved in practice and the Canal accounts reflect substantial losses.

I think that has been so almost since the time this formula has been followed.

If the Canal were to be made self-sustaining on this basis, tolls would have to be increased to at least $1.40 a ton.

Several basic changes are made in this formula by H. R. 8677, considered in connection with Public Law 808, which was the charter of the Panama Railroad Company. This act is primarily an amendment to the Panama Railroad

charter. Under the new formula, revenues from tolls would be expected to cover:

1. Interest at the "going" rate (approximately 2.3 percent at the present time) on the capital investment in the Panama Canal, excluding the amount of any investment in national defense and civil government facilities and extraordinary expenditures or losses incurred through national policy and not related to the Company's operations. The Company would be required actually to pay interest to the Treasury.

[fol. 102] There would be offset against the amount of the investment subject to interest a proportionate share of the dividends which have been paid into the Treasury by the Panama Railroad Company. These amount to approximately $38,000,000. I think that figure is a little high. That is now provided for under existing law. Under the House amendment, there would also be excluded from the investment approximately $129,000,000, representing interest during the construction period.

2. The costs of operating and maintaining the Canal—that is the same in both formulas.

3. Approximately 50 percent of the net costs of civil government, health and sanitation. The remainder of these costs would be borne by the other corporate divisions such as the railroads, hotels, harbor terminals, steamship lines, utilities, commissaries, etc., out of revenues derived from the sale of goods and services.

It is believed that the amendment to section 14 (b) providing that the rate of tolls on laden vessels shall not exceed $1 per net vessel-ton is completely inconsistent with the objective of placing the Canal on a self-sustaining basis and, in effect, negates the preceding part of the subsection requiring that—

tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal.

The Bureau of the Budget recommends that the amendment establishing a ceiling on tolls be deleted.

The House also added a new subsection (c) to section 14 providing that—

capital investment for interest purposes shall not include any interest during construction.

The report of the House committee points out that interest during construction was not included in the Canal accounts until 1932 and that at the present time the Tennessee Valley Authority does not include interest during construction in its capital accounts. In further explanation of the amendment, the report states:

Such exclusion is recommended not only because of precedent but as a just and reasonable recognition of the defense value of the Canal, and as an offset against operations which have been conducted and which, to some extent, will be conducted in the future without reimbursement, for the Military Establishment or others in the interest of the United States.

If it is the determination of the Congress that exclusion of interest during construction from the tolls base represents—

a just and reasonable recognition of the defense value of the Canal—

and a fair offset against nonreimbursable services, the Bureau of the Budget has no objection to the amendment.

The practical effect of the above amendment is to reduce the toll rate approximately 10 cents a ton. If interest during construction were included in the investment base, the toll rate would probably have to be set at approximately $1.05 a ton—and I want to make it clear it is difficult to arrive at a correct estimate. One of the purposes of the legislation is to provide an accounting system which will provide the necessary information in order to comply with the requirements set forth in the bill.

[fol. 163] It is sincerely believed that enactment of H. R. 8677 is essential to bring about a more logical grouping of the functions now administered by the Panama Canal and Panama Railroad Company, to provide a more equitable basis for determining toll rates and other charges, to facilitate operations, and, in general, to promote the more effective administration of the Panama Canal enterprise.

I think the representative of the Department of the Army will make a recommendation, in which we concur, that section 7 of the original House bill be restored, which is merely a perfecting amendment dealing with claims for damages against the company.

Senator Byrd. Mr. Felix Larkin, who is general counsel of the Department of Defense, is here, and we will hear from him at this time. Mr. Seidman, will you please remain, if you can.

Statement of Felix Larkin, General Counsel, Department of Defense

Mr. Larkin. Mr. Chairman, I would just like to register for the record that the bill before you was transmitted to the Congress by Secretary Johnson in May, as an approved item on the legislative program of the Department of Defense, so that the Department of Defense is in effect sponsoring this bill.

Senator Byrd. You approve of the bill as it passed the House?

Mr. Larkin. We do, except for the $1 toll. We are not in accord with the limitation of the $1 toll. We are in accord with the Bureau of the Budget's position on that.

Senator Byrd. The Budget had two exceptions, I think the $1 toll and the capital investment for interest purposes shall not include interest during time of construction.

Mr. Larkin. That latter was deleted by the House, as I recall it, from the bill. We have no objection.

Senator Byrd. You stated in your statement that you approved it, excepting——

Mr. Seidman. It was approved as part of the President's program.

Mr. Larkin. Under the legislative procedures within the Department of Defense, the Department of the Army has been assigned the responsibility for carrying forward the details of the bill and its justifications.

Senator Byrd. To go back to the capital investment during construction, do you recommend it? You say you have no objection. Are you in favor of it?

Mr. Larkin. No, sir. We take a neutral attitude. We are not sponsoring this deletion as such. We are content with it as it appears.

Senator Byrd. Is that the same position you have?

Mr. Seidman. Yes.

Senator Byrd. You do favor deleting "the rate of tolls shall not exceed $1 per net vessel ton?

Mr. Larkin. Yes.

Mr. Seidman. It is wholly inconsistent with the objective of placing the Bureau on a self-sustaining basis.

Mr. Larkin. As in the case of many other legislative items on the Department of Defense program, the Office of the Secretary assigns responsibility for the different bills [fol. 104] to different departments, depending on the department that has the predominant interest. In this case the Department of the Army is the representative for the whole Department of Defense, and Mr. Frank Shackelford, the counsel of the Department of the Army, is present to give for the record the Department of the Army's views, which I am just certifying to you are the views of the whole Department of Defense.

Senator Byrd. To make clear again, you have no objection, you advance no objection to not considering capital investment during time of construction? You have no objection to it, you simply do not approve it; is that right?

Mr. Larkin. We are content with it as it is, we have not sponsored it affirmatively.

Senator Byrd. Thank you very much, Mr. Larkin. You may be released.

Next is Mr. Francis Shackelford, General Counsel of the Department of the Army.

Statement of Francis Shackelford, Counselor of the Department of the Army

Mr. Shackelford. Mr. Chairman, as counselor of the Department of the Army, I am appearing before you today in behalf of the Defense Department to state briefly the position of the Army on H. R. 8677. The Department favors its enactment provided there is deleted the amendment in subsection (b) of section 14 establishing a ceiling of $1 on tolls and provided there is restored section 7 of the bill as originally introduced in the House, requiring damage claims arising out of injuries in the locks or waterway to be brought against the Panama Canal Company, not the Canal Zone government. The section on damage claims

was apparently indvertently stricken before the passage of the bill by the House. Since under the terms of H. R. 8677 the Canal waterway would be transferred to the Canal Company, it follows that the adjustment of any damage claims resulting from the use of the waterway or its locks should be the responsibility of the corporation.

In accordance with the general recommendations of the Commission on the Organization of the Executive Branch of the Government, H. R. 8677 would permit the transfer of business-type activities, including the operation and maintenance of the waterway, to a corporate entity, with resulting greater flexibility of management and simpler accounting, budgeting, and auditing methods. The Canal Zone government would then administer only such basically governmental functions as health, sanitation, education, police, and fire protection.

The more efficient mangagement of the business-type activities in the Panama Canal area should enhance rather than hurt the military usefulness of the Canal.

Concerning the amendment placing a ceiling of $1 per net vessel-ton on the toll rates, the Army believes that the enactment of such an arbitrary ceiling would be unrealistic, since it would tend to nullify the earlier part of the same subsection requiring tolls to be—

prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal.

[fol. 105] An arbitrary ceiling might well make it impossible for the Panama Canal Company to fix its tolls at a rate high enough to meet the economic and operating conditions at a given time. This would destroy one of the main purposes for the passage of this legislation.

H. R. 8677 primarily concerns improved management and accounting procedures relating to the Government's business operations in the Panama Canal area and Mr. Harold Seidman, of the Bureau of the Budget, has already discussed the fiscal details of the bill.

Senator Byrd. You do not request deletion from the House bill the item of interest on capital investment during time of construction?

Mr. Shackelford. No, sir. Our position is the same as

Mr. Larkin's and Mr. Seidman's, the position they have already taken on that point.

Senator Byrd. Thank you very much, Mr. Shackelford.

Mr. Shackelford. Thank you, Mr. Chairman.

Senator Byrd. I see my old friend, Senator Joe Ball, in the audience, with whom I served in the Senate. I will be very glad to hear from him.

This is Senator Joseph H. Ball, representing the Association of American Shipowners.

Statement of Joseph H. Ball, Vice President, Association of American Shipowners

Mr. Ball. Mr. Chairman, I realize you are cramped for time. I would like to just insert in the record the statement which I made for our association before the House committee, which discusses the general subject, and then just make a short statement extemporaneously on the bill as it came over from the House.

Senator Byrd. Very well, it may be inserted in the record at this point.

(The statement referred to above is as follows:)

Statement of Joseph H. Ball, Vice President, Association of American Shipowners

My name is Joseph H. Ball. I am vice president of the Association of American Shipowners, which has offices at 90 Broad Street, New York, N. Y., and at 1713 K Street NW., Washington, D. C. Our association is composed of some of the oldest and best-established companies operating American-flag ships. None of them has received any subsidy under the Merchant Marine Act, 1936. They are engaged in both the foreign and domestic trades.

Several members of our association are in the intercoastal trade, and use the Panama Canal constantly. Most of them use the Canal at times and all of them are interested in the question of Panama Canal tolls and administration and therefore in H. R. 8677.

Naturally, shipping companies would like the Panama Canal tolls as low as possible because the round-trip cost of transiting the Canal, now from $12,000 to $15,000, is a substantial item in operating costs, particularly to the inter-

coastal lines which are just beginning to revive following their complete elimination during World War II and which are facing stiff competition from railroad and trucking companies. How important Canal toll costs are to the intercoastal lines is indicated by a 1939 study made by the Maritime Commission. The study showed that during the preceding 5 years the intercoastal companies had shown a net aggregate loss of $4,000,000. During the same period they had paid a total of approximately $25,000,000 of Canal tolls.

I am sure I need not further emphasize to this subcommittee the importance of operating costs among problems of intercoastal lines.

[fol. 106] I assume that H. R. 8677 and the companion bill in the Senate, S. 3649, were drafted by the Department of the Army and the Bureau of the Budget to carry out the recommendations of the Budget Bureau in its report to the President, January 31, 1950 (H. Doc. No. 460, 81st Cong., 2d sess.), or at least those recommendations which were approved by the President. The only recommendation of the Budget Bureau not carried out by H. R. 8677, so far as I can determine, is that the Canal administration be transferred to the Department of Commerce. President Truman reserved judgment on this particular recommendation that the business and governmental functions in the

Our association supports the Budget Bureau recommendation that the business and governmental functions in the Canal Zone be separated and I shall therefore confine my testimony to the provision of H. R. 8677, dealing with Canal tolls, sections 24 and 25, beginning on page 19.

We have no objection to section 24 which transfers the authority to fix tolls and basic rules of measurement to the Panama Canal Company, subject to final approval by the President. The transfer of authority retains the present provision in the law requiring 6 months' notice, by publication in the Federal Register, of any proposed change in toll rates or measurement rules.

Our association does take exception to the Budget Bureau's recommendations as to the method of computing toll rates and to section 25 of H. R. 8677, which would implement those recommendations. Section 25 proposes the following changes in existing law:

1. It eliminates both the minimum and maximum toll rates for laden vessels, which are now 75 cents and $1 per ton respectively.

2. Where the present law contains no standards to guide determination of toll rates, the proposed new subsection 412(b) would require that tolls be fixed at a rate calculated to cover, as nearly as practicable:

(a) All costs of operating the Panama Canal and the facilities and appurtenances relating thereto;

(b) Interest and depreciation on the capital investment in the Canal and ancillary facilities (rate not specified); and

(c) A share of the net costs of operation of the civil government of the Canal Zone proportionate to the ratio which gross Canal tolls bears to the net revenues from all other business operations of the Panama Canal Company. Although H. R. 8677 in lines 5 through 11, page 21, refers to gross revenues from tolls and also to total gross reveneus of the corporation, it provides that in computing gross revenues from other business operations, the cost of commodities resold and revenues arising from transactions within the corporation and from transaction with the Canal Zone government shall be deducted. That has the effect of reducing the revenues from business operations other than the Canal to a net rather than a gross basis. The result would be to load almost the entire cost of civil government onto Canal tolls and exempt residents of the Canal Zone from paying more than a very nominal part of the cost of civil government.

3. Transit tolls on vessels owned or operated by the United States, which now transit the Canal free, would be computed and treated as part of Canal revenues in fixing commercial tolls, but the President would be given discretion to decide whether such vessels actually would pay tolls.

The Budget Bureau report recommended (p. 8) that the interest charged on capital investment in the Canal be at current average long-term rates paid by the Government, which is 2.3 percent. This is not provided specifically in H. R. 8677, although section 246(b) of the Panama Canal Code now provides that the Company shall pay interest on capital to the Treasury at a rate which the Secretary of the

Treasury determines is required to reimburse the Treasury for its cost.

Heretofore in Canal bookkeeping, as the subcommittee knows, revenues from commercial tolls (no allowance has been made for free transits of the Canal), civil revenues and net earnings of business enterprises have been lumped together and balanced against net appropriation expenses to determine net revenues, which have ranged all the way from $18,000,000 annually to a deficit of over $5,000,000 in 1944. Then the accountants have deducted an interest charge of 3 percent annually on capital (now figured at $516,000,000). Whereas net revenues since the Canal was first opened for operation in 1914 totaled nearly $274,000,000 to June 30, 1949, the 3 percent interest charge changed this into a net deficit of nearly $167,000,000 on that date.

To revert for a moment to the Budget Bureau report: that report on page 8 correctly points out:

[fol. 107] "The most controversial aspects of tolls policy are (1) the interest charged on the capital investment; and (2) the question of whether any of the costs of construction, operating, and maintaining the Canal should be allocated to national defense."

The Budget Bureau study resolves the question of capital allocation cost between national defense and commercial use with a very brief discussion concluding that none of the capital cost should be allocated to national defense. It does recommend that the cost of currently free transits of Government vessels should be included in revenue of the Canal and enter into determination of toll rates.

The Budget Bureau study makes no mention whatever nor does H. R. 8677 make any allowance for a factor which we believe is worthy of consideration by Congress in fixing policy on this issue. That factor is the tremendous value of the Canal is serving the foreign and domestic commerce of the United States. The Federal Government has spent hundreds of millions of dollars improving our rivers and harbors, even building canals, to serve the commerce of the United States. No federal tolls are charged to vessels using harbor facilities in New York, Boston, Baltimore, New Orleans, Savannah, San Francisco, and our other ports

where the Army engineers at the direction of Congress have spent many hundreds of millions of dollars improving the harbors. Congress adopted this policy and authorized these expenditures, without levying a direct charge to those using them, on the theory that all of the commerce of the United States benefits from them and that therefore the benefits of such improvements were general enough so that their costs equitably could be spread over all the taxpayers. These harbors, incidentally, are open on the same terms to American flag ships and foreign shipping, the thinking again being that it was the commerce of the United States, and not the ship operators, which benefited from the improvements.

In the discussion of the Canal tolls problem much has been made of the fact that half or more of the shipping using the Canal is of foreign registry and that, therefore, foreign-ship operators would derive at least half the benefit of any lowering of tolls that might result from changes in the present formula on which tolls charges are based.

But that argument overlooks the very important fact that approximately two-thirds of the total commercial tonnage transiting the Canal either originates in the United States, is destined for the United States, or both. If the transits by Government vessels of the United States were included, the percentage of tonnage transiting the Canal directly serving the commerce or defense of the United States would be more than 70 percent.

The percentage I have just mentioned is derived from tables in the 1948 and 1949 Reports of the Governor of the Panama Canal. The figures are shown in exhibit A, attached to my statement, which I ask to have included in the record. These tables show that, of the total of 24,000,000 tons plus transiting the Canal in 1948, 16,000,000 tons either originated in the United States, was destined for the United States, or both. In 1949, the proportion was 17,000,000 out of a total of 25,000,000 tons. I cite these figures to show that, to the extent of at least two-thirds of the total tonnage moving through the Canal, that improvement serves the over-all commerce of the United States just as directly as do the many harbors on the east and west coasts which have been improved with Federal funds. That seems to our association a fact which Congress could well take

into account when writing into legislation the formula by which tolls in the future should be fixed.

The questions of how much of the capital cost of the Canal should be allocated to national defense, and the interest charged during construction and since, also seem to us to be issues that Congress should decide in legislation rather than leaving them to executive determination, as does existing law, which would be unchanged by H. R. 8677. The way in which these questions are resolved will affect directly not only our domestic merchant marine but also our whole foreign trade and commerce, and they should be decided by Congress.

The history of Canal accounting practices in itself demonstrates that this is a field of controversy where there is room for honest differences of opinion. The original construction cost of the Canal was $385,000,000. A Government commission in 1921 found that, of that cost, approximately $113,000,000 properly should be allocated to national defense. Subsequent commissions in 1931 and 1937 reversed that decision and found that the entire cost of [fol. 108] $385,000,000, plus $129,000,000 interest during construction, plus $12,000,000 in payments to the Republic of Panama, all should be included in the capital base on which commercial tolls should be fixed so as to pay all operating costs plus 3 percent interest on this capitalization. In recent years the 3-percent interest has been charged on $516,000,000 of capitalization.

That the Canal is of tremendous value to national defense cannot be denied. If it were not there, the additional cost of the Navy due to lack of mobility of its Pacific and Atlantic fleets probably would run annually into several times the total cost of the Canal at our present rate of defense expenditure. One could make a logical argument that the savings in naval and war shipping costs during World War II alone would justify writing off the entire investment in the Canal as a national-defense expenditure.

On the other hand, it could be argued that Canal tolls might be doubled or quadrupled without destroying completely the use of the Canal and thereby a very large profit returned annually to the Treasury. Presumably, as long as tolls were substantially below the cost of taking a ship around the Horn, ships still would use the Canal and pay the

toll. Our domestic intercoastal trade undoubtedly would be liquidated by such a course of charging all the traffic would bear, but in 1948 the intercoastal shipping accounted for only 15 percent of the total tonnage going through the Canal, and even less in 1949; so that, as a strictly profit-making enterprise, the Canal could increase its revenues to the maximum by raising tolls to the limit traffic would bear. United States commerce, of course, would pay two-thirds of the additional cost.

But it is perfectly apparent that the Panama Canal is not that kind of purely commercial enterprise. For one thing, no commercial concern could have negotiated the various treaties with Panama under which the Canal Zone was ceded to the United States and the Canal constructed. Somewhere between these two extremes of charging off the Canal completely to national defense (or treating it as we do our river and harbor improvements) and a purely commercial approach aimed at making the maximum profit to the Federal Treasury lies the sound solution.

As has been pointed out, it is a fruitless undertaking to attempt to go back 40 years and determine whether commercial or defense considerations were uppermost in the minds of those who were responsible for the Canal project. Furthermore, it is not necessary. The Canal has demonstrated its tremendous value in our defense in two wars. Its value to our over-all commerce is shown in the annual reports of the Governor. It is for Congress to determine what portion of the cost of the Canal properly should be charged off to those two purposes. Different persons undoubtedly can arrive at different conclusions from the same set of facts, but our association believes that a minimum of half of the capital cost of the Canal should be so allocated.

Our association strongly urges this subcommittee, and the full committee, to rewrite the new subsections 412(b) and (c) proposed by H. R. 8677, beginning on line 24 of page 20, so as to do five things:

1. Require that a fair proportion of the cost of operating and maintaining the Canal be allocated to national defense, preferably specifying a minimum percentage to be so allocated in the law. The proportion of United States Govern-

ment vessels transiting the Canal indicates that the very least percentage of cost so allocated should be 10 percent.

2. Require that a fair proportion of the capital cost of the Canal and its ancillary facilities be allocated to national defense, specifying a minimum percentage to be so allocated in the law. Our association believes that minimum percentage should be at least 50 percent.

3. Specify that the interest rate to be paid the Treasury on the capital allocated to commercial operations shall not be greater than the average rate of interest borne by all interest-bearing, long-term public issues of the United States at the time toll rates are fixed. While section 246(b) of the Panama Canal Code may cover this particular issue, we believe it would be safer to spell it out in the section dealing with the fixing of Canal tolls.

4. Require that the net costs of civil government in the Canal Zone be distributed among all business-type operations in the zone, including Government commissaries, in proportion to their gross revenues. This appears to our association to be the only fair and equitable way of distributing these costs, which are in lieu of the taxes these business-type operations otherwise would pay. As we have pointed out, the proposal in this regard in H. R. 8677 is completely unfair in that it applies these government costs to gross revenues of the Canal but only to net revenues of other business-type operations.

[fol. 109] 5. Retain a maximum toll rate for laden commercial vessels in the law, preferably at the present maximum of $1 per ton. I realize that this is perhaps putting an extra padlock on the gate. But our association is vitally concerned with the intercoastal trade, and any substantial increase in Canal tolls at this time would be a most serious burden to that trade, which is facing enough difficulties in surviving as it is.

Under the tolls formula proposed in H. R. 8677 as it stands, an increase of 30 cents or more per ton in commercial tolls would be certain, depending on the volume of Government vessels transiting the Canal and the percentage of civil-government costs allocated to the Canal operation. Such an increase, which would amount to $2,000 to $2,500 for each transit of the Canal by a C-type vessel, would be a considerable burden on American-flag operators, and particularly on the intercoastal lines, which already are having

a difficult time keeping their costs low enough to compete with the railroads.

In conclusion, our association again emphasizes that our use of the Canal in two world wars, as well as its tremendous value in serving the over-all trade and commerce of the United States, amply justifies Congress in allocating a substantial part of the original cost of the Panama Canal to national defense, and we strongly urge adoption of an amendment to H. R. 8677 along the lines we have proposed. I thank you for this opportunity to present our views.

EXHIBIT A.—Association of American Ship Owners

Figures on Origin and Destination of Cargo Transiting Panama Canal in Fiscal year 1949, from Annual Report of the Governor of the Panama Canal

[Tables Nos. 37 and 38 on pp. 123-127]

	Fiscal year 1948		Fiscal year 1949	
	Tons	Percent	Tons	Percent
Westbound cargo:				
Total	8,679,140	100 0	9,899,088	100 0
United States origin	5,763,989	66 4	6,563,591	66 3
United States destination	2,137,807	24 6	2,035,030	20 6
Minus United States intercoastal	1,719,005		1,449,561	
Net United States destination	418,802		585,469	
Total United States origin, or destination, or both	6,182,791	71 3	7,149,060	72 2
Eastbound cargo:				
Total	15,438,522	100 0	15,406,070	100 0
United States origin	4,896,573	31 7	2,839,985	18 4
United States destination	7,079,613	45 9	8,929,766	58 0
Minus United States intercoastal	2,118,799		1,611,157	
Net United States destination	4,960,814		7,288,609	
Total United States origin, or destination, or both	9,857,387	63 8	10,128,594	65 7
Both directions:				
Total cargo	24,117,662	100 0	25,305,158	100 0
United States origin, or destination, or both	16,040,178	65 5	17,277,654	68 2
Total United States intercoastal	3,837,804	15 1	3,090,718	12 2

EXHIBIT B—Proposed Amendment to H. R. 8677

Beginning with line 24, page 20, strike out through line 23 on page 21, and insert—

"(b) Tolls on merchant vessels and yachts shall be prescribed at a rate or rates sufficient, under normal traffic conditions, to cover but not exceed (1) such part of the expense of maintaining and operating the Canal (in no event more than —— per centum of such expense) as is fairly allocable to non-national-defense purposes of the Canal, plus (2) interest on such portion of the depreciated capital cost (not in excess of —— per centum of such cost) of the Canal (including improvements) as is fairly allocable to non-national-defense purposes of the Canal, such interest to be at a rate not greater than the average rate of interest borne by all interest-bearing long-term public issues of the United States at the time such toll rate or rates are prescribed, plus (3) that part of the net costs of operation of the agency known as the Canal Zone government which [fol. 110] bears the same ratio to the total net costs of such agency as the estimated gross toll revenues of the Canal bears to the estimated total gross revenues of the corporation from all business-type operations, including commissaries. For the purposes of this section, the allocation of expenses and costs between national defense and non-national-defense purposes of the Canal shall be made on the basis of the relationship between the value of the benefit of the Canal as a military asset to all of the people of the United States and the value of the benefit of the Canal as a commercial asset to shippers of goods. The rate of tolls on laden merchant vessels shall not exceed $1.00 per net ton as determined under the rules for the measurement of vessels for the Panama Canal. In addition to the tolls based on measurement or displacement tonnage, tolls may be levied on passengers at rates not to exceed $1.50 for each passenger. As used in this subsection, 'the Canal' includes only the Canal itself and its ancillary facilities and equipment for vessel transit purposes.

"(c) Public vessels of the United States, including warships, naval tenders, colliers, tankers, transport , hospital ships, and other vessels owned or chartered by the United States for transporting troops or supplies, may be transited

through the Canal free or be required to pay tolls, in the discretion of the President."

Mr. Ball. Our association felt that much more recognition of the defense purposes and the value of the Canal should have been given in the formula provided in the bill than is the case as it was submitted and as it was passed by the House. We are very much in favor of the change in accounting practices there and the separation of business and Government functions. It is practically impossible now for a layman studying the Panama Canal reports to figure out exactly what costs belong in a business category and which ones properly belong on the Government side, or even to separate the defense costs from commercial costs.

We suggested in the House committee keeping the $1 limit on tolls largely because it does give Congress another opportunity to examine the whole picture in case tolls, which are now at 90 cents, should go above $1 under the formula.

I agree with Mr. Seidman that it is perhaps inconsistent with the formula proposed in the bill and its main purpose to some extent; but it is not, in my opinion, entirely inconsistent because of the fact that, for one thing, the formula is stated in very broad language. Until it is actually applied, Congress cannot know exactly how it will work out, and this gives Congress another chance to examine it in case it does result in a substantial boost in tolls; and that makes considerable sense, because I think Congress is as much interested in what happens——

Senator Byrd. You agree with Mr. Seidman that, if you include interest during construction, the rate would be approximately $1.05 under this bill?

Mr. Ball. I do not know, Mr. Chairman, what the rate would be.

Senator Byrd. That is the estimate.

Mr. Ball. I heard his estimate; but, until you know what that is based on and why that formula is going to be applied, we do not know frankly what the rate will be.

In our association we have at least three shipping companies that are in the intercoastal trade, which is about one-third today what it was prior to World War II. Lines

in the intercoastal business are having a difficult time surviving; yet they are a vital part of our merchant marine. A very steep increase in the Canal tolls would make it difficult for them.

We think it is an important enough factor to justify having Congress take another look at this formula if it [fol. 111] should result in tolls above $1. For instance, the language in the bill which provides for the allocation of civil-government costs between the commercial operation of the Canal and other business operations is pretty general and vague. It could be applied a number of different ways. Until you actually see how it is applied, you do not know how fairly it is going to work out. That is why we have supported the $1 limitation.

Also, I do not know whether the allocation of $29,000,000 in interest charged during the construction period represents a fair determination of the original defense value of the Canal or not. We thought in the beginning it was probably equivalent; it was at least half defense.

Senator Byrd. A substantial loss, in any event; is that not right?

Mr. Ball. In actual operating expenses they show a little profit—have most of the years—but when they add the 3 percent interest charge on the $534,000,000 capital investment——

Senator Byrd. That is 10 cents a ton.

Mr. Ball. They have had a $534,000,000 capital base.

Senator Byrd. I mean the interest during construction amounts to 10 cents a ton.

Mr. Ball. That would be on the forty-nine——

Senator Byrd. Mr. Seidman says in his testimony:

The objective of the present formula has not been achieved in practice, and the Canal accounts reflect substantial losses. If the Canal were to be made self-sustaining on this basis, tolls would have to be increased to at least $1.40 a ton.

Mr. Ball. I think that is correct.

Senator Byrd. It is not paying its way now.

Mr. Ball. Not with that 3 percent and not with the capital structure they have built up. I think the capital structure is much larger than it should be.

Senator Byrd. What is the tonnage of the Panama Canal a year?

Mr. Ball. About 20,000,000 tons.

Mr. Seidman. Somewhat more than that, I believe.

Senator Byrd. Twenty million tons.

Mr. Seidman. I think it has gone up.

Senator Byrd. Should be $1.40, and you are getting 90 cents. That would be about ten million a year.

Mr. Ball. Twenty-five million tons approximately.

Senator Byrd. If this $1.40 figure is correct, you would be losing almost 50 cents a ton.

Mr. Ball. That is under a formula the Budget Bureau agrees is not realistic or fair to shipping interests. They do disagree. I think shipping interests in the beginning felt a much larger part of the original capital cost than is represented by this $129,000,000 interest charged during construction should be charged off to national defense. I think all of the shipping interests are willing to accept the compromise; I do not know how the Federation feels about the dollar limitation.

Senator Byrd. The charge during construction is 10 cents a ton. If you take the interest off, it still leaves $1.30 a ton.

Mr. Seidman. That is on the basis of the old formula, which has never been applied, which we regarded as not being entirely equitable, and there are recommendations made for revision of the tolls formula.

[fol. 112] Senator Byrd. Does the new formula actually cover costs?

Mr. Seidman. Yes; including interest.

Senator Byrd. You figure that will be $1.05?

Mr. Seidman. That is the best we can figure.

Senator Byrd. There is a big difference between that and the old formula.

Mr. Seidman. I can explain some of that difference fairly readily. For one thing, under the present formula the complete cost of transiting military and Government vessels is borne by commercial shipping entirely. They pay no credit and there is no credit. We propose not necessarily that they pay, but that the Canal have the benefit of the credit. That amounts to an average of almost $2,500,000 a year. Of course, during the war years it went up to almost 75 percent. Then under the present formula all the costs of civil government, health, and sanitation, are charged against the tolls. The Panama Rail-

road Company does not contribute hardly anything to that. That is charged against tolls. This will be spread over the whole enterprise.

Again taking very rough estimates, there would be about 50 percent. I think the Chief of the Management Division of the Panama Canal did provide estimates of about 53 percent of the 1949 figures would be against tolls.

Mr. Chambers. When you redistribute the costs among various businesses like commissaries, et cetera, the net result will be they will have to be self-sustaining and contribute their share toward the over-all operating costs of the Canal.

Mr. Seidman. It is the intention of this bill that the whole enterprise shall be self-sustaining and conducted without either direct or indirect cost to the United States Treasury.

Mr. Chambers. To whatever extent that comes about, that will be reflected in reduced charges against the ships going through the Canal?

Mr. Seidman: Yes; to the extent that these costs are borne by other than shipping, they will naturally be reflected in the tolls.

Senator Byrd. Interest on investment——

Mr. Seidman. It includes interest on the investment. In estimating the interest, of course, each of these business operations, any business has to carry its share of the interest, too, in proportion to the investment.

Senator Byrd. What about military and Government vessels?

Mr. Seidman. There would be a credit there for the amount of tolls. That is now computed in the Canal account. They keep a record of it, but they have never taken any credit for it in estimating the toll.

Mr. Chambers. If we take away this one-hundred-some-odd-million dollars of interest on capital investment, is there going to be any reduction in the charge against Government vessels that would pass through the Canal, or will they pay the same rate commercial ships pay?

Mr. Seidman. Under the terms of the bill as introduced in the House, they would have the same rate and no change was made in that in the House. That is again, as I say, not a recommendation made by the President. It was an amendment put on in the House.

Mr. Chambers. Coming back to these commissary and other businesses that you operate down there, in figuring [fol. 113] out the amount that they have to pay, the interest they have to pay, are you leaving in the interest on capital investment at the time of construction?

Mr. Seidman. No.

Mr. Chambers. So if you take it out for tolls, you will also take it out as a charge against other businesses of the Canal?

Mr. Seidman. Except to the extent that may reflect costs during construction for those businesses, which I doubt, because the Panama Railroad Company, for instance, was there before there was a canal, and I would assume that the charge of interest during construction is a cost exclusively against the transit operation and has been in the past.

That was part of the cost of constructing the Canal and not of the other business divisions.

Senator Byrd. Would this 10 cents be applicable to 24,000,000 tons of shipping?

Mr. Seidman. Approximately.

Senator Byrd. This $2,500,000 would be a loss to the Government as a contribution, so to speak, if it should be adopted, to the national defense.

Is there anything else in this that takes into consideration the value of the Panama Canal to national defense?

Mr. Seidman. They do not necessarily come directly out of the Treasury. There were two features in the original bill. One was there would be the credit for the transiting of military and Government vessels. In other words, in the future they would pay.

Senator Byrd. The Government would have to pay for the military vessels?

Mr. Seidman. It is a cost we did not feel was proper to pass on to commercial shipping.

Senator Byrd. Is there a subsidy that would be given, except the $2,500,000, if we should cancel it, on the interest during the time that the Canal was under construction, not after it was completed, but during construction?

Mr. Seidman. That is right.

Senator Byrd. You would still get a return on the actual money invested in the Canal on an interest basis of 3 per cent?

Mr. Seidman. That is right, and we expect in the future to absorb certain costs.

Senator Byrd. Is that 3 percent?

Mr. Seidman. The going rate, the going long-term rate.

Senator Byrd. If you delete this thing about the interest on construction, it would mean that the Federal Government would be losing on that interest $2,500,000 a year.

Mr. Seidman. That is right.

Senator Byrd. Outside of that, it would be a self-sustaining proposition?

Mr. Seidman. Yes.

Mr. Chambers. Wouldn't that $2,500,000 be reduced by the number of Government ships that went through there? In other words, we are not going to have the Government pay itself, it is going to be a credit on the books; so we are saying there will be a reduction in the loss to the Government only where the commercial ships going through are concerned, and at the present time it is about 60 percent, but it fluctuates.

[fol. 114] Senator Byrd. The Government makes lots of investments all around where they do not get any interest on it.

Mr. Seidman. This would be unique. If I might point out, there are some unique provisions. The employees compensation requirement—that is usually paid by the Civil Service Commission, but we expect that to be covered, and interest and depreciation.

Senator Byrd. As far as the authority of the Budget Bureau, if we report this bill favorably, the activity, you say, will pay its way, the Government will pay for their vessels, private people will pay for their vessels, and the only loss that will occur is the loss if you assume the interest.

Mr. Seidman. That is right, and that was not in the Canal account until 1932.

Senator Byrd. You will get interest on the amount invested?

Mr. Seidman. And any future investment.

Senator Byrd. Senator Ball, do you have anything further?

Mr. Ball. I believe what he says shows the $1.40 figure is a completely unrealistic figure insofar as reflecting the actual cost that should be borne by commercial transit.

In other words, commercial tolls have been loaded in the Canal accounting with all the costs there were down there, just lumped everything together.

Senator Byrd. Including the costs of civil government.

This tonnage figure includes Government vessels; does it?

Mr. Ball. I am not certain.

Mr. Seidman. Is that right, Mr. Burdick?

Mr. Burdick. For the last fiscal year it was slightly over 28,000,000 tons of commercial shipping.

Mr. Seidman. That traffic has gone up considerably in the last year, has it not, Mr. Burdick?

Mr. Burdick. Yes.

Senator Byrd. Mr. Burdick, have you got any statement to make?

Statement of Bernard F. Burdick, Chief of Office of the Panama Canal

Mr. Burdick. I have no prepared statement to make. I am here as the representative of the Governor of the Panama Canal.

Senator Byrd. We will be glad to have any statement you care to make about this bill.

Mr. Burdick. As a matter of law, the Governor of the Panama Canal who is the President of the Company which under the terms of this bill would maintain and operate the waterway and all of the facilities, with the exception of the activities connected with civil government.

Senator Byrd. Does the Governor have any recommendations to make to this committee with respect to this bill?

Mr. Burdick. I have no statement, Mr. Chairman, unless you want the views of the Governor with respect to the amendments.

Senator Byrd. I am always glad to hear the views of anybody that is interested in the legislation if he cares to make a statement, either now or send it to me in the next day or two. I will be glad to give it consideration in making my report. Is there any part of the bill that you object to?

[fol. 115] Mr. Burdick. The amendment with respect to the dollar limitation the Governor feels is wholly inconsistent with the recommendations of the President, wholly

inconsistent with the philosophy of the bill, which is to set up the obligations, to fix the obligations of the company, and to provide revenues to pay those obligations.

Under the bill the Company would have fixed obligations:

One, to pay the Corporation's cost of operation, including depreciation, the cost of services rendered by other Government agencies;

Two, to pay interest on the Government net direct investment in the Company;

Three, to reimburse the Treasury for annuity payments to the Republic of Panama; and

Four, to pay the net costs of the Government and sanitation of the Canal Zone.

Now against that we would have all of the revenues of the Company and would have the use of the tolls.

Senator Byrd. You would have the credit from the Government ships, too, would you not?

Mr. Burdick. Yes, for the purpose of determining whether we are actually paying the required interest rate to the Treasury. That is, the going interest rate.

Senator Byrd. What have you got to say about the interest while under construction?

Mr. Burdick. That, Mr. Chairman, is a matter that the Governor feels, as the other agencies do, that it is a matter of national policy that should be determined by legislation. He would like to see a fair and just rate charged to all users of the Canal, American as well as foreign-flag vessels. Had he been present he would have pointed out that the study of the Budget Bureau referred to the efficiency report in 1931 and the Neutral Tolls Committee in 1937, that no major part of the capital cost of the Canal should be allocated to national defense. The conclusions of the Budget Bureau are set forth in the report before you.

Senator Byrd. Do you regard that as a major part, interest while under construction?

Mr. Burdick. We are merely pointing out that that will affect the tolls rate, and we are saying that is a matter which should be determined by Congress as a national policy.

Senator Byrd. That would not be major, would it?

Mr. Burdick. No, sir. We are pointing out that the solution proposed by the Bureau of the Budget of this

problem was that both Government and the commercial vessels pay on a user basis. That is in the bill. In addition, this amendment would write off

Senator Byrd. Would the foreign vessels be on a different basis from the American?

Mr. Burdick. No, sir. Under the treaty commitments they pay the same rate as American-flag vessels.

Senator Byrd. I think the Government vessels should pay in the way of a credit.

Mr. Burdick. I think all are agreed on that, that they should pay on a user basis.

Senator Byrd. Do you agree with the representative of the Bureau of the Budget that the only contribution in the bill toward national defense, so to speak, is the fact [fol. 116] that if we delete the amendment whereby they pay interest on construction, that would be about the only contribution that would be made toward national defense from the General Treasury? In other words, it would be otherwise self-sustaining; is that right?

Mr. Burdick. I think that is right. It is not the only recognition, however, in the bill.

Senator Byrd. What other recognition?

Mr. Burdick. The recognition comes in the separation of the civil government from the other.

Senator Byrd. What is the cost of the civil government there?

Mr. Burdick. Including sanitation, it is about $7,000,000 a year.

Senator Byrd. Is that entirely in connection with operating the Canal?

Mr. Burdick. That has been the theory in the past, that the only need for civil government and sanitation was incidental to the maintenance and operation of the Canal.

Senator Byrd. The tolls would not pay anything toward the civil government under this new bill?

Mr. Burdick. They would pay, according to the estimate, about half of that. The other would be charged

Senator Byrd. If it is $7,000,000, would there be an appropriation made for the three and a half million?

Mr. Burdick. No. I think we could say an appropriation would not be made.

Senator Byrd. From what source is it to be paid?

Mr. Burdick. As I understand it, the tolls rate, if you eliminate the maximum rate here, will be set high enough to pay about half of that. The other half will be paid by these business divisions. That will come from their customers. Some are Government employees, some are Army and Navy——

Senator Byrd. You said a few minutes ago the cost of civil government was a recognition of national defense. The Federal Treasury pays nothing under this bill toward operation of civil government; is that right? One-half is paid by the business people and the other half is a charge to tolls?

Mr. Burdick. It is a recognition, first, because we write out of the capital account the amount that heretofore has been included in there for the installations and facilities necessary to conduct the civil government and the sanitation.

Senator Byrd. No interest charge on that?

Mr. Burdick. That is right.

Senator Byrd. Of course, there should not be. But for all practical purposes, it is pretty nearly self-sustaining under this bill, except for the thought of trying to get interest during the time of construction; am I correct about that? It is practically self-sustaining from the standpoint of the collection of tolls, except on this interest feature, if that should be taken out of the bill. If that is left in the bill—if you take the House bill as it is, eliminating the ceiling, it is self-sustaining?

Mr. Burdick. That is the intention of the bill; yes, sir.

Senator Byrd. Practically completely self-sustaining. There is no contribution from the Federal Treasury for the value of the Panama Canal for national defense; is that right?

Mr. Burdick. No; not other than the write-off of the interest.

Senator Byrd. Anything further, Mr. Burdick?

[fol. 117] Mr. Burdick. I would join in the recommendations that section 7 of the bill be restored, and we would have to defer to the judgment and be glad to, as to the extent of what other provisions of the bill can be included without delaying or defeating the bill. The Governor feels that all the provisions of the original bill are necessary to

complete legislative coverage of the objectives of the bill and that their enactment should not be deferred until the next session.

Senator Byrd: Excepting the limitation on the tolls, as I understand it, you have no specific recommendation to make about the bill as it stands now; is that right?

Mr. Burdick. Except to restore section 7 and any of the others that the committee might decide could be done without interfering with the passage of the bill.

Senator Byrd. Thank you, sir.

Our next witness will be Mr. Gregory Prince, assistant general counsel, representing the Association of American Railroads.

Statement of Gregory S. Prince, Assistant General Counsel, Association of American Railroads

Mr. Prince. As this committee well knows, Mr. Chairman, the subject of the Panama Canal tolls has received intensive study for the past several years. One phase of the study of this subject was an investigation made by a special subcommittee, under the chairmanship of Representative Thompson, of the House Merchant Marine and Fisheries Committee, pursuant to House Resolution 44, conducted in the first session of the Eighty-first Congress. As a part of that investigation there was a hearing at which testimony was presented by most of the witnesses who have appeared before the Panama Canal subcommittee with respect to H. R. 8677. Two witnesses representing the Association of American Railroads appeared before the Thompson subcommittee on June 14, 1949, and presented fully the views of the railroads with respect to the subject of Panama Canal tolls.

In view of the fact that H. R. 8677 is for the purpose of carrying out the recommendations made in the report by the Bureau of the Budget to the President and that such report by the Bureau of the Budget was made pursuant to a recommendation of the Thompson subcommittee, it is assumed that the record of the hearing pursuant to House Resolution 44 before the Thompson subcommittee is, as a practical matter, a part of the over-all record on the subject. Accordingly it is not felt necessary to repeat here all the views of the railroad as stated at that hearing.

However, in order that this committee may be advised of the scope of the previous presentation, there is here set forth at the outset a brief outline of the points therein covered.

The true nature of the proposal by the shipping interests that 50 percent of the Federal Government's investment in the Panama Canal be allocated to national defense was discussed. It was shown that the proposal would in essence amount to an annual subsidy and that the subsidy would be conferred in large part upon the operators of foreign vessels. It was also shown that the adoption of such a proposal would be in direct conflict with the national transportation policy declared in the Transportation Act of 1940.

Very substantial authority was quoted to demonstrate that the primary purpose of constructing the Canal was [fol. 118] as an aid to commerce. In support of this conclusion extensive quotations from a report by the special committee of three appointed by President Roosevelt in 1936 were included. The full importance of the Panama Canal from the standpoint of national defense was recognized. It was also pointed out that this special committee found that the service which the Canal renders to the United States Army and Navy vessels by allowing them to transit the Canal without charge might justly be regarded as but a partial compensation for the valuable service rendered by the Army and Navy in protecting the Canal and maintaing its neutral use by the vessels of commerce and war of all nations. It was recognized that the experience of the last war might justify a different treatment of the so-called forgiven tolls. By reason of the fact that commercial shipping under private operation came to a virtual standstill during the war and for several years thereafter as a result of the Government's assumption of the control and operation of such vessels, the view was expressed that the policy might be changed in this respect to require payment of tolls by Government vessels or the allowance of a credit for the transit of such vessels in calculating the tolls to be levied on commercial vessels.

It was also shown that for the period 1914 to 1948 the computed cumulative deficit amounted to approximately

$151,500,000; that toll-free transits in this period amounted to approximately $64,500,000; and that the deficit after allowance of such forgiven tolls was approximately $87,000,000. (Those figures brought down through the fiscal year 1949 would be as follows: Total computed deficit, $166,800,000; toll-free transits, $67,000,000; and adjusted deficit, $99,800,000.) A similar showing was made for the 10-year period 1939-48, which resulted in an adjusted deficit of approximately $79,000,000. It was also indicated that on the basis of the present methods of determining the level of tolls, modified to make allowance for toll-free transits, the toll rate would have to be increased from 90 cents a ton to approximately $1.35 a ton in order to place the operation of the Panama Canal on a self-sustaining basis.

These views as well as the views of shipping interests were before the Bureau of the Budget at the time they made their study and were explored in conference between representatives of the Bureau and the principal parties in interest. After a full consideration of the evidence and conflicting views as to this vital issue the Bureau of the Budget concluded that there should be no allocation to national defense of any part of the capital investment in the Panama Canal.

Two previous studies, both of which are referred to in the report of the Bureau of the Budget, reached precisely the same conclusion. The report (H. Doc. No. 460, 81st Cong., 1st sess.) had the following to say on the subject, at page 9:

Studies made by the Bureau of Efficiency in 1931 and by the special committee in 1937 determined that no major part of the capital costs of the Panama Canal should be allocated to national defense. The only additional feature of the Canal which might not have been included if it had been constructed exclusively for commercial use is the increase in the width of the locks from 100 to 110 feet. Actually the additional width has been an important factor in facilitating the approach to, and handling of commercial vessels in, the locks. There would appear to be no significant added costs in the construction of the Canal attributable solely to national defense.

The subsidy to national defense comes not from a failure to allocate capital costs but from the fact that military and other Government vessels do not pay tolls.

[fol. 119] Thus the Bureau of the Budget recommends that no part of the capital investment in the Canal be arbitrarily allocated to national defense and, in lieu thereof, that tolls be paid for the transit of military and other Government vessels, or that credit be allowed on account of such transits. This amounts to a recommendation that all of the costs of the Canal be divided on a user basis. The recommendation of the Bureau of the Budget on this point is unquestionably sound and should be adopted.

This principle is contained in section 25 of H. R. 8677, which amends section 412 of title 2 of the Canal Zone Code. It is heartily endorsed by the railroads, and the committee is urged to make no change in this respect.

As recommended by the Bureau of the Budget, H. R. 8677, in section 18 (e), provides that interest on investment shall be at a rate or rates determined by the Secretary of the Treasury as required to reimburse the Treasury for its cost. The Bureau of the Budget in its report estimated that the rate of interest presently required to reimburse the Treasury for its cost would be in the neighborhood of 2.3 percent. Under present procedures interest on investment is calculated at 3 percent.

Thus, it is apparent that immediately an advantage accrues to shipping interests by reason of the adoption of the theory of using the "going" rate of interest. Attention is also called to the fact that at various periods in the past the "going" rate of interest was higher than the flat 3 percent employed heretofore, and at such times an advantage accrued to shipping from the use of the nonfluctuating interest rate. The point we wish to make is that the committee should make it clear in its report that its decision with respect to the treatment of the rate of interest to be charged on the capital investment is a determination based on principle, not expediency, and that in the event the "going" rate of interest should go up in the future, the interest to be charged on the investment in the Panama Canal must also go up.

I should like to refer to one other recommendation of the Bureau of the Budget. In discussing the method of

arriving at the capital investment in the Panama Canal on which interest would be calculated, the representatives of the Bureau of the Budget suggested that there should be excluded from the amount of such investment figure first, the investment in national defense facilities, and second, the investment in civil government, health, and sanitation facilities. It was also suggested, as a third offset against the capital investment, that there be deducted the amount of the dividends which have been heretofore paid into the Treasury by the Panama Railroad Company, amounting to approximately $38,000,000.

No justification is seen for this third offset. The facts are that the operations of the Panama Railroad Company in the past have been sucessful and a substantial surplus has been accumulated from the conduct of its operations. On the other hand, the operation of the Panama Canal in the past has not been sucessful from a monetary standpoint and there has been accumulated a substantial deficit in the conduct of its operations. If the surplus accumulated by the successful segment of this new combined operation is to be deducted from the capitalization of the new organization, then certainly in all logic the accumulated deficit [fol. 120] of the unsuccessful segment of the combined organization should be added to the new capitalization. As already shown, the accumulated deficit from the operation of the Canal, even after a credit allowance for toll-free transits, amounts to approximately $100,000,000. Thus the net effect of taking into account the past operations of both segments of the new combined enterprise would be to increase the capitalization of the new organization by $62,000,000.

It is left to the wisdom of this committee and the Congress to determine whether to make a fresh start, using as the investment figure the net property investment shown on the books of the Canal, or whether to take into account the results of the past operations of the two principal segments of the combined enterprise. In no event, however, would it seem to be appropriate to take into account only the past operations of the Panama Railroad Company. Appropriate amendments to H. R. 8677 should be made to rectify this situation.

A major phrase of the recommendations of the Budget Bureau had to do with the organizational aspects of the

various activities conducted in the Canal Zone. In this connection it was recommended that all of the functions of the Panama Canal except those relating to civil government, health, and sanitation, be transferred to the Panama Railroad Company and that the railroad company's name be changed to the Panama Canal Company. Further, it was recommended that the new Panama Canal Company operate under types of controls designed to meet the needs of programs of a business character such as business-type budget and commercial-type audit. These recommendations would seem to be in accord with certain principles advocated by the Hoover Commission. The functions of civil government, health, and sanitation, would be lodged in an organization to be known as the Canal Zone Government. The result would be a division of the activities in the Canal Zone along functional lines.

In view of the requirement in paragraph (b) of section 412 of title 2 of the Canal Zone Code as it would be amended by this bill, that tolls be prescribed at a rate calculated to cover all costs of maintaining and operating the Canal, it seems clear that revenues from the railroad and other business activities of the new company are not to be used to subsidize the operation of the Canal itself. The reasons advanced for the realinement of the various activities in the Canal Zone would seem to be well founded and the provisions of the bill would seem to be adequate to carry out these recommendations.

A large number of the provisions of H. R. 8677 relate to the codification of certain laws and regulations governing the operation of the Panama Canal. If the other proposals contained in the bill are to be adopted, there would seem to be little question but that the codification provisions would be necessary. Thus, in general, with the exception of the treatment of the Panama Railroad Co.'s past dividends as a deduction from the capital investment figure for the Panama Canal, the railroads have no objections to the principles of H. R. 8677 and believe that the enactment of the bill amended to take care of the point mentioned above will in many respects result in the establishment of a more sound policy with respect to the operation of the Panama Canal than exists under the present law and procedures.

In conclusion, two further comments would seem appropriate in the light of certain questions from members of

the committee during the course of the hearing on this [fol. 121] bill. First, it is respectfully suggested that under no conditions should policies be adopted with respect to the establishment of tolls at the Panama Canal which have for their purpose the using of the level of tolls as a means of controlling competition between the various modes of transportation. Tolls at the Panama Canal should be set with the view alone to the establishment of rates which will make the Panama Canal a self-sustaining enterprise.

Second, the level of rates of tolls should never be employed as a means of subsidizing water carriers. The issue of the necessity of subsidies for carriers by water, either in domestic or foreign commerce, should be met squarely and considered separately. In the case of air carriers, for instance, the issue of subsidy has been greatly confused by reason of the payment for the transportation of mail being used as a vehicle for conferring subsidies. In that situation it has been clearly recognized by the President of the United States, the Secretary of Commerce, the Hoover Commission, several committees of Congress, and numerous impartial students of the problem, that there must be a separation of compensation for transportation of mail and subsidy to the airlines. Under no circumstances should confusion be introduced into a new area of transportation by any such step in the wrong direction. Nothing contained in H. R. 8677 would lend itself to the establishment of a rate of tolls at the Panama Canal designed to accomplish the unsound objectives referred to above, and it is respectfully requested that no amendments be considered which would do so.

I might for your benefit just outline very briefly the principles that we have adhered to in our consideration of the question of the Panama Canal tolls. We felt all along that the principle which should control in this situation is the establishment of procedures which would lead to making the Panama Canal a self-sufficient enterprise without conferring of a subsidy upon commercial shipping.

That commercial shipping to some extent being in competition with the railroads and also any subsidy which might be involved in the toll rate, as has already been explained, would apply to foreign shipping perhaps in greater amount than to American shipping. So that what we have

advocated has simply been that they set up the tolls on a basis that would be a self-liquidating and self-sustaining enterprise.

Senator Byrd. Do you regard the formula set forth in this bill as accomplishing that purpose?

Mr. Prince. We think the bill in its original form was certainly designed to do that and in its effect would substantially do that.

Senator Byrd. But would not do it with the limitation of a dollar, would it?

Mr. Prince. The two amendments made by the House I want to speak on at this point. One is the limitation of one dollar. As other witnesses have stated, that is, wholly inconsistent with the recommendations of the Bureau of the Budget, the recommendations of the President, and the bill in its theory and philosophy, and is contrary to the very provision in which that limitation is found.

We think that limitation should be eliminated, that it cannot be set up on a self-sustaining basis if you have an artificial ceiling. We advocate, very sincerely, that that limitation be removed.

The other matter, which is perhaps the only other highly controversial one at this point, is the question of interest during construction. We do not see that in principle that [fol. 122] is any different from any other cost. It is an actual cost; a cost that was incurred. Any private business has to incur the cost of interest on the funds used in construction of that business. We think that is a part of the cost. We feel that the elimination of free tolls for Government vessels is a fair change in the law.

We think they should pay tolls on the transit of Government vessels or, in lieu thereof, a credit, so that commercial vessels would not have to pay for that. But when you get it set up on that basis, then all the costs are included, and each pays according to its use. In peacetime, when the preponderant use is by commercial vessels, they would pay the preponderance of the tolls, and then in time of war, when the preponderant use is by military vessels, the major part of the cost would be charged to them.

Senator Byrd. Even then, let me ask you this question: Understand, I have not made up my mind, so far as my recommendation is concerned to the full committee, about

charging interest on the construction, but, even if that is taken out, this would be a fairer bill, insofar as paying the cost of operation down there, than the present law, would it not?

Mr. Prince. Yes; I would say it is, because of the artificiality we have now; we have both a minimum and a maximum.

Senator Byrd. The formula in this bill, even if you eliminate interest on construction, would be a fairer formula toward reaching a real cost of operation and charging it back to the shippers than the present legislation?

Mr. Prince: I think that is generally so.

Senator Byrd. I would like to ask the Budget representative that.

Mr. Seidman. I think that is absolutely correct.

Senator Byrd. You are charging 90 cents, and evidently it is costing $1.05 or $1.10. How do you pay the loss?

Mr. Seidman: They do not actually pay interest, so they are not making any payment on interest. The loss is on the books.

Senator Byrd. That is just a book account?

Mr. Seidman. And they also get an appropriation for the rest.

Senator Byrd. Are you paying the cost of operation down there under present tolls, under the present toll system, without regard to interest?

Mr. Seidman. I think it is just about covering its cost of operation.

Senator Byrd. Do you ask for reimbursement from the Government?

Mr. Seidman. The tolls are reappropriated; that is the effect. They balance each other out.

Senator Byrd. Anything further, Mr. Prince?

Mr. Prince. I might point out this. It has already been stated the toll rate under the present formula would have to go up to $1.40 to pay all the costs. The various recommendations that have been made by the Bureau of the Budget, which we think are generally sound, tend to reduce those costs chargeable to commercial vessels, so that it comes down to somewhere in the neighborhood of a dollar.

We have not objected, and we have not raised any objections at all, simply because these changes have a tendency

to reduce the toll. We have taken our position from the standpoint of principle.

Senator Byrd. I do not think under any conditions we ought to charge the cost of transmitting military and Government vessels to private shipping. Unless there is a [fol. 123] big profit in private shipping, that should not be done. The Government gives credit in everything else they buy or receive.

Mr. Prince. We think that is sound, and we generally support the bill. We merely object to these two changes made by the House.

Senator Byrd. Your main objection is to the ceiling?

Mr. Prince. The main objection is to the ceiling, and the next objection is to the exclusion of interest during construction.

Senator Byrd. All right, sir. Is there anything else?

Thank you very much, Mr. Prince.

Frazier Bailey, representing the National Federation of American Shipping.

Statement of Frazer A. Bailey, President of the National Federation of American Shipping, Inc.

Mr. Bailey. My name is Frazer A. Bailey. I am president of the National Federation of American Shipping, Inc., which represents more than one-half of all privately owned deep-water shipping under the United States flag.

On the matter of the ceiling, we, of course, would like a ceiling, but I want to say that the federation, the group I represent, would like a ceiling on the toll rate, but we did not ask for it in our presentation before either the Senate or the House and we are not urging it at this time.

On the matter of the interest during the construction period, we urged that there should be a greater recognition of the national-defense value of the Canal, and we pointed out that statesmen and the military at the time the Canal was conceived, and during the course of its construction, stated that one of the principal purposes for which the Canal was built was military including statements by President Theodore Roosevelt and the Governor of the Canal, from there all down the line.

We think that approximately one-half of it should have

been written off for national defense, as far as investment is concerned, for interest purposes.

The report of the Budget Bureau said——

Senator Byrd: Let me interrupt you. How much would that have amounted to a ton?

Mr. Bailey. About one-half of the $534,000,000, or approximately 20 cents a ton, I would say, instead of 10, in rough figures. Do you agree?

Mr. Seidman. I think under the proposal the Shipping Federation made before the House Committee, it would be, I guess, a little more than double. It would be approximately 20 cents a ton.

Mr. Bailey. That was a rough figure. We thought that should be the case.

The report of the Budget originally—I think Mr. Seidman will confirm it—said in their study it was impossible to determine whether national defense or commercial usage was primary in the purposes for which the Canal was constructed. However, we are not raising that point at this time. We are accepting as a compromise the $129,000,000 interest during the course of construction, and I might point in late Government accounting it has not been [fol. 124] the practice to include interest during construction, I understand, in the Tennessee Valley project or in the Grand Coulee Dam.

I am appearing in support of H. R. 8677—to reorganize Panama Canal Zone activities and establish fair and equitable transit tolls.

The bill is designed to implement recommendations of the Bureau of the Budget and of the President with respect to the organization and operation of the Panama Canal. In general, these recommendations—contained in House Document 460, Eighty-first Congress, second session—are designed to improve the organization of the Canal and to make readily available the necessary data from which to arrive at a proper basis for toll rates.

Under the bill, transit and business functions—that is, the Canal itself, the railroad, the steamship lines, the commissary, the hydroelectric system, mechanical division, wharves and piers, and so forth—would be operated on a business basis by the Panama Railroad Company, renamed the Panama Canal Company; and civil government func-

tions, including health and sanitation, would be performed by the Canal Zone Government. Tolls for commercial ships would be related to transit costs, including interest, depreciation, and a fair share of the net cost of health, sanitation, and civil government. Free transit of Government ships would be eliminated. The net appropriated cost of operation of the Canal Zone Government would be reimbursed to the Treasury by the corporation, reimbursement being properly charged to the various corporate divisions on an equitable basis.

Interest at going Government rates, on the capital of the Panama Canal Company, would be returned to the Treasury by that corporation. As an administrative matter each division thereof, including the transit division, would be expected to return the interest allocable to its capital. The Panama Canal Company's capital would consist of its present corporate capital, plus the fair commercial value of assets transferred to it, plus any future additions less any dividends, past or future, returned to the Treasury. Such capital would not include interest during construction now included on the Canal books.

Tolls would be set by the company directors from time to time on 6 months' notice and after public hearing and subject to the approval of the President.

The legislative history and background of the bill are set out in an exhibit entitled "Legislative History" which we offer for the record.

Senator Byrd. Very well, it will be inserted.

(The document referred to above is as follows:)

Legislative History

On February 28, 1949, the House of Representatives passed House Resolution 44 which provided in part for a full and complete study and analysis by the House Merchant Marine and Fisheries Committee or any authorized subcommittee, of the financial operation of the Panama Canal with particular reference to the proper accounting allocation of costs attributable to the transit of commercial and military vessels; military activities in the Canal Zone; and civilian government and business operations and to recommend to the Congress concerning proper and equitable toll policy.

The passage of House Resolution 44 grew out of the fact that in response to a suggestion contained in the report of the House Appropriations Committee on the Army civil functions appropriations bill for fiscal year ending June 30, [fol. 125] 1949, that Panama Canal tolls should be increased, the President, as recommended by the Department of the Army, issued a proclamation No. 2775, on March 26, 1948, increasing the applicable tolls from 90 cents to $1 per Panama Canal net ton.

When this appropriation bill (H. R. 5524) was before the Senate, representatives of the shipping industry and Members of Congress appeared before the Appropriations Committee and pointed out that adequate testimony was not made available to the Appropriations Committee of the House. Further testimony was given as to the effect of such a tolls increase upon American shipping, the lack of justification therefor, and other matters relating to this subject.

The report of the Senate Appropriations Committee, No. 1167, of April 23, 1948, contained the following statement on this subject:

"Shortly after the committee's hearing, and prior to its publication, the committee was advised that the Department of the Army submitted to the Chief Executive a proclamation, which was signed by the Chief Executive, increasing Canal tolls for laden vessels from 90 cents to $1 per ton to become effective October 1948.

"In view of the additional information and evidence on this matter developed at the committee's hearing, which was not available to the House committee, the committee strongly urges that the proclamation increasing the Canal tolls be reviewed, especially in the light of the adverse effect such an increase will have on American shipping."

On September 8, 1948, the President issued a proclamation in which he deferred the effective date of the toll increase previously authorized until April 1, 1949. Following the passage of House Resolution 44, the President, on March 14, 1949, again postponed the effective date of such a proposed increase in Panama Canal tolls by similar proclamation until September 1, 1949.

A special Panama Canal Tolls Subcommittee of the House Merchant Marine and Fisheries Committee was appointed pursuant to House Resolution 44 and conducted hearings on the subject at which the federation and other interested groups were heard. On August 23, 1949, the subcommittee filed its first interim report to the Congress (No. 1304). This report pointed out that an adequate analysis of the tolls problem could not be made until a study of the organization aspects of all phases of the Panama Canal, including the Panama Railroad, was made and recommended such a study. The President promptly directed the Bureau of the Budget to make the study and on August 25, 1949, pending the completion of the study, President Truman again postponed any increase in tolls until April 1, 1950.

The Bureau of the Budget made its report on January 31, 1950, and recommended: (We attach a copy of the Bureau of the Budget report and ask that it be made a part of the record.)

1. That in the organization of the Canal, transit and business functions should be separated from civil-government functions, and such transit and business functions should be operated by a compay to be known as the Panama Canal Company.

2. That tolls for commercial ships should be related to transit costs, including interest on Government investment.

3. That Government ships should pay tolls, too.

4. That the cost of dual-purpose activities at the Isthmus (schools, hospitals, etc., used by the military, civil government and transit personnel) should be proportionately charged to the military, civil government, and the Panama Canal Company.

The report failed to recommend, however, that a fair share of the capital cost of the Canal (upon which interest is now charged in the toll base) should be allocated to national defense in Canal accounts. While admitting the dual purpose and nature of the Canal—commerce and defense—and conceding them to be so nearly balanced that it is impossible to determine which purpose was primary, the budget report would assess interest on the entire capital investment in the Canal against transit tolls.

The President transmitted the Bureau of the Budget report to Congress on January 31, 1950, and endorsed all recommendations except one relating to the transfer of the Canal to the jurisdiction of the Secretary of Commerce, suggesting that that recommendation deserved further study On March 6, 1950, pointing out that implementation of the budget recommendation would take some time, the President again deferred any increase, this time until April 1, 1951.

[fol. 126] Except on the matter of capital structure, the report is reasonably fair and equitable, particularly in that it suggests as a matter of principle that all beneficiaries of Canal Zone operations should bear their just and fair share of the expenses of such operations, military, civil government, and ship transit, respectively, and recommends a practical arrangement for bringing this about.

As to capital structure, the federation considers that the defense value and functioning of the Canal are not recognized, and urges to this committee that a reasonable allocation of capital as well as operating costs should be made to national defense.

On August 16, 1950, the House Merchant Marine and Fisheries Committee, after study and extensive discussion with all interests, reported on H. R. 8677 with amendments. This bill had been introduced on May 31, 1950, and was designed to implement the Budget Bureau's recommendations. It was drawn by the Canal authorities and contained certain additional provisions which were deemed desirable by the Canal authorities in the interest of codification or of supplementing the budget recommendations. The committee deleted this codifying material.

The committee also added a compromise provision in order to make allowances for the defense value of the Canal. This compromise provision consisted of the elimination from Canal capital investment of so-called interest during the construction period which had been included by the Canal authorities in 1932 for the apparent purpose of supporting higher toll rates.

The bill also provided a maximum of $1 for the toll rate.

The bill, as reported with amendments, appears to be acceptable to the shipping industry and, except for the maximum limitation of toll rates, to the administration.

On August 24, 1950, it was passed by the House as reported by the committee.

Historical—Defense Considerations

The 10-year period preceding the granting of authority for the construction of the Panama Canal witnessed difficulties with Great Britain over the Venezuela-British Guiana boundary; the dispute with Germany over Venezuelan debts; the Spanish-American War (the race of the battleship *Oregon* around Cape Horn to join our fleet off Cuba, and the long voyage out to Manila Bay by Dewey); the Boxer Rebellion; and the strained relations with Japan over immigration. In each of these critical periods the United States Navy was divided between Atlantic and Pacific stations, and lack of a canal at Panama rendered any naval force behind Panama in each instance of little immediate value.

Considerations of this sort led Theodore Roosevelt to say in his message to Congress on Jauary 4, 1904, of the Panama Canal:

"Long acknowledged to be essential to our commercial development * * * has become, as a result of the recent extension of our territorial dominion, more than ever essential to our national defense. In the light of our present situation, the establishment of easy and speedy communication by sea presents itself not simply as something to be desired but as an object to be positively and promptly attained. Reasons of convenience have been superseded by reasons of vital necessity."

Numerous statements made by the Canal authorities at the time of the construction of the Canal, and subsequently, show that national defense considerations provided the major justification for the construction of the Canal. Col Harry Burgess, former Governor of the Canal Zone, writing in The Military Engineer, July-August 1929, stated:

"The French company * * * failed disastrously in executing the project. These facts being known, it seems improbable that the United States would have decided on the construction of the Canal solely from commercial considerations. The deciding factor was the value of the Canal as an element of the national defense."

General Goethals, who built the waterway, told a Senate committee in 1911:

"Assuming that the Panama Canal is a military necessity of the United States, I naturally take the military point of view that it is for the use of the fleet. I have always felt that the cost of building the Canal should be charged off the books as against the military defenses of the Union. * * *"

[fol. 127] The national defense value of the Canal was estimated in 1929 by Governor Burgess:

"In other words, for the United States to obtain without a canal the naval power—national safety insurance—equal to that of the present fleet with the Canal would require an increase of the naval force by 50 or 60 percent, with an increase in annual cost of about 40 percent. The naval expenditure in the fiscal year 1928 was about $320,000,000, and it would be fair to evaluate the defense insurance of the Canal as at least $125,000,000 per year."

And now, on January 31, 1950, in a report to the President of the United States, the Bureau of the Budget states:

"Whether any part of the capital cost of the Canal should be allocated to national defense presents a problem to which there is no positive answer. The Canal admittedly does serve a dual purpose—defense and commerce. However, any attempt to establish which purpose was primary at the time the Canal was built would be an utterly fruitless undertaking."

The total amount of tolls collected from commercial ships is about $20,000,000 per year. Government ships have in the past transited the Canal tolls-free.

Experience has borne out the wisdom of the Canal's construction as a defense facility. In his report the Governor of the Canal in 1947 wrote:

"Based on the volume of military traffic that transited the Panama Canal during the war years, an approximation has been made of the monetary saving that has accrued to the United States from its use. This saving which is estimated to be $1,500,000,000 is in shipping costs only, and does not represent the lives and material that were saved by a shortening of the war."

One and one-half billion dollars is approximately three times the capital investment in the construction and improvement of the waterway.

Concerning the financial operation of the Canal the Governor General stated in the same report to the Congress:

"During the period from 1914 to 1947, tolls and other revenues amounting to $587,137,000 were deposited in the Treasury of the United States, while the net appropriation expense for the same period was $315,956,000. If tolls at the prescribed rates had been paid on tolls-free vessels of the United States, it is estimated that the additional revenue would have amounted to not less than $64,000,000. Thus, the Panama Canal has returned to the United States in money or in free services the entire cost of maintenance and operation since its completion and, in addition, all but $74,000,000 of interest at 3 percent annually on the net capital investment."

In 1947, appearing before the Appropriations Committee of the House of Representatives, the Governor General of the Canal Zone made the following statement:

"* * * The Canal is a great international public utility serving the maritime commerce of the world; from its opening in 1914, to 1946, its revenues have been sufficient to pay all costs of operation and maintenance, including the costs of sanitation and civil government, and in addition to return approximately 2 percent of the net capital investment.

"These figures disregard the value of the Canal to national defense. It is safe to say that the services rendered by the Canal to the recent war effort were more than enough to repay the entire cost of maintenance and operation, but because of revenues of the Canal as a commercial enterprise, its cost as an adjunct to the national defense has been negligible."

The total investment of the United States in the construction and improvement of the Panama Canal to date amounts to about $500,000,000 as far as can be ascertained by published Government accounts. This figure appears to

include interest payments or accruals of more than $100,000,000 during the period of construction, and further very substantial payments made by the Department of State to the Republic of Panama in the period 1914-1920 under the Hay-Bunan-Varilla treaty. This is the treaty under which the United States concession to build the Panama Canal was obtained from the Republic of Panama. There is some question concerning whether this capital account for the Panama Canal includes certain military expenses connected with its defense during World War I.

[fol. 128] Chief Federal canals in the United States

[Data by Chief of Engineers, U. S. Army]

Canal	Location	Length	Rates	Cost (to date) expended by Army engineers
		Miles		
Cape Cod	Buzzards Bay to Cape Cod Bay	17.5	Free	[1]$31,425,550
Black Rock	East Bank at Niagara River, Buffalo	13.5	do	8,684,777
Chesapeake Delaware	Delaware River to Chesapeake Bay	16	do	14,454,447
Delaware-Rehoboth Bays	Delaware Bay to Rehoboth Bay	12	do	435,383
Intercoastal waterway	Norfolk, Va., to Jacksonville, Fla.	800	do	
Norfolk District				3,396,276
Wilmington District				9,401,800
Charleston District				7,345,888
Savannah District				763,599
Jacksonville District				263,659
				21,171,222
Florida waterway	Jacksonville, Miami	372	do	7,573,038
Intercoastal waterway	Apalachee Bay to Mexican Border		do	
Mobile District				5,832,168
New Orleans District				13,769,172
Galveston District				14,646,725
				34,248,065
Illinois and Mississippi	LaSalle, Illinois to Mississippi River	[2] 75	do	4,580,143
Illinois waterway	Lake Michigan to Mississippi River		do	26,407,302
Dalles-Celilo	The Dalles to Celilo Falls, Columbia River.	5	do	4,669,092
Lake Washington	Puget Sound to Lake Washington	8	do	3,539,295
"Soo"	Between Lake Huron and Lake Superior, U. S.	63	do	51,091,707

[1] Original purchase price $11,500,000.
[2] With feeder of 29.3 miles.

Suez and Kiel Canals

The Suez Canal is 104.50 miles long. Its construction was begun in 1859 and it was opened to traffic in 1869. The corporate investment in 1911 represented approximately $127,000,000. The canal is open to all nations and free from blockade by the Convention of Constantinople, signed in 1888.

The canal is operated by the Compagnie Universelle du Canal Maritime de Suez with its administrative seat in Paris. It is privately owned and its closely held shares, which sell at a 100 percent premium, are traded on the Paris Bourse. In 1875, Disraeli, then British Prime Minister, bought 176,602 of its shares from the Khedive Ismail of Egypt. Shares were numerically doubled in 1924 and His Majesty's Government, as of 1947, held 238,312 capital shares and 115,192 "jouissance" shares out of a total of 530,758 and 269,242 respectively.

The corporation has 32 directors, of which 10 are British, 2 Egyptian, 1 Dutch, 1 American, and 18 French.

In 1949 the Egyptian Government became a privileged partner in the Suez Canal under which it will receive 7 percent of the company's gross profits, with a guaranteed annual minimum of £350,000, and an increase in its directorate to seven.

In 1948, the canal earned over £11,000,000 (over $44,000,000). Annual dividends have been as high as 33 percent per annum of the cost of stock.

Rates of toll on the Suez Canal are 8 shillings (approximately $1.60 before devaluation, now approximately $1.12) per Suez Canal net ton.

The Kiel Canal in Germany cost that Government $132,000,000 prior to the war, and by the terms of the Versailles Treaty transit tolls on commercial vessels were limited to an amount which would cover operation and upkeep, an amount equal to about 6 percent of the amount presently charged at Panama.

The military aspects and value of the Panama Canal are obvious when it is noted that the Governor General of the Panama Canal is a general in the United States Army and under the supervision and direction of the Secretary of the Army.

[fol. 129] Financial History

Analysis of published accounts and reports on the Panama Canal by the National Federal of American Shipping show that:

(a) In the building, improvement, and operation of the basic Canal to date no charge has been made against national defense.

Once, in 1921, at the direction of the Secretary of War an amount of $113,000,000 was charged off to national defense. But in 1931 the profits of the Canal were such that the Canal authorities appeared to be concerned about sustaining the high toll rate. In 1932 the national defense capital was reincluded in the Canal accounts for interest purposes in the toll base, and in addition there was then added $120,000,000 of interest during the construction period.

(b) The financial accounts in the Government books have been and are being charged with interest at the rate of 3 percent per annum on funds advanced for the construction and improvement of the Canal not only during the entire period of its operation but during the construction period as well.

(c) The Canal accounts show substantial charges for sanitation, hospitals, public parks, and playgrounds, which appear to be civic or civil government expenses, at least in part, and which are partly attributable to military, naval, railroad, diplomatic or private interests in the Canal Zone.

(d) United States Government vessels have been furnished free transits which at the prevailing commercial rate have a total value of over $64,000,000.

(e) Inadequate reimbursement is received from the Army, Navy, and other activities for certain functions performed for them by the Canal authorities.

(f) Some revenues which otherwise would accrue to the Canal are paid over to an account called business operations and the Panama Canal Railroad, both of which show separately reported profits.

(g) If interest on United States funds be excluded, transit tolls paid by commercial vessels, plus tolls forgiven on Government vessels, have exceeded all construction and

improvements costs and all operating costs transit purposes by about $2,000,000.

(h) Panama Canal toll policy has not been consistent with the policy adopted for all other waterways in North America. On the 12 principal waterways of the United States, including the Soo and Cape Cod Canals, and on Canadian Welland Canal, no transit tolls are charged to either domestic or foreign shipping.

As an example of military expenses now charged to shipping, recurring statements in the reports of the Governor General of the Canal show that substantial increases in expenses of numerous activities of the Canal have been directly attributable to the increases in the number of military and naval personnel located at the Canal. In the annual report of the Governor for fiscal 1940, for example, it is stated:

"In the foregoing table it may be seen that there has been a net increase of 1,747 in the number of gold employees in the rolls of the Panama Canal and the Panama Railroad Company. This is an increase of practically 50 percent, and with a few minor exceptions, it may be seen in every unit of the organization. *This is the direct result of the great volume of construction activity now being carried on locally in national-defense programs.* * * * Because of the general increase in activity it has likewise been necessary to increase the force in numerous other units not actually engaged in construction, such as the accounting department, the health department, and the commissaries." [Emphasis supplied.]

This statement is reiterated in the 1941 report of the Canal.

In his annual report for 1941, the Governor of the Canal showed that the expense of schools in the Canal Zone was largely attributable not to shipping, but to the military forces in the Canal Zone. He stated:

"During the past year careful surveys were made of the plans for the expected increase in population of the Canal Zone, both in military forces and in civilian forces engaged in construction activities. The school administration keeps informed as to the anticipated changes and rearranges and

plans for the expansion of educational facilities in accordance with such changes."

In the same report he stated:

"The recreational facilities provided by the playground section are used extensively not only by the civilian employees and their families, but also by the United States defense forces stationed on the Isthmus. Practically all [fol. 130] facilities are utilized to their capacity during visits of units of the United States Navy."

The Governor, in his report for 1940, stated of expense for the expansion and improvement of hospital facilities at Gorgas Hospital:

"The increase in the Army and Canal Zone personnel makes the alteration and installation of necessary facilities imperative for adequate hospitalization."

Certain portions of the Canal, like the width and depth of locks at certain points, have been constructed, maintained, and operated only because they are necessary to accommodate the beam and draft of certain war vessels, and yet the entire expense of their operation and maintenance is included in the net annual appropriation which, as stated in the accounts of the Canal, "are considered as provided from the tolls and other receipts covered into the Treasury" (Governor's report, 1946, p. 94).

We suggest that a fair allocation of these expenses unrelated to the operation of the Canal should be made, and that tolls and other revenues should pay the remaining expenses of the Canal authorities.

Mr. Bailey. Now, with regard to section 7, the damage claims we have no objections to the reinclusion of section 7.

I would like to say that the federation's policy supports this bill. It does not support free tolls at Panama, nor do we contend for preferential tolls to American shipping. The shipping interests which we represent believe that the Panama Canal should be placed upon a pay-as-you-go basis after full consideration of its military and its commercial characteristics. We do not believe the American taxpayer should be called upon to provide funds for the oper-

ation of the Panama Canal for commercial transit purposes. We believe the Canal should be self-sustaining from its toll receipts as to all expenses incurred in its operation for transit purposes. We do not believe that Government or military ships should be afforded free transit, as they have in the past, and that the toll burden should be placed solely upon commercial vessels. It has been demonstrated that, in the past, substantial portions of military and civil government expenses have been included in the accounts of the Canal and have strongly influenced the Canal toll policy. It is admitted by all parties that the Canal was built for the dual purpose of national defense and commercial transits. We offer for the record an exhibit which has been prepared showing the defense considerations involved in the Canal's construction.

We urge that there be, and the bill provides for, a recognition of the military value of the Panama Canal in its toll policy, and thereafter it should operate without loss or without profit. That part of the shipping industry which we represent is prepared to pay its full proportionate share of all expenses directly connected with commercial transits. It does not feel that it should pay any part of military or civil government expenses which are incurred on the Canal Zone.

Panama Canal tolls are a substantial expense item in shipping. Especially is thus true in the case of our domestic lines which use it most frequently. These are our American shipping services in greatest need of relief. The cost of an 8-hour transit through the Panama Canal is approximately $6,600 for a C-3 freighter—more than $800 per hour. American shipping pays annually approximately $10,000,000 in Panama Canal tolls. On an intercoastal round trip, toll charges for a C-3 freighter are approximately equal to 1 month's basic wage bill of the vessel.

The Panama Canal is not the only canal project for the transit of vessels which has been constructed and is being operated by the United States Government. Without going [fol. 131] into the question of the maintenance of harbors, rivers, and other navigable waters there may be cited as representing substantial investment by the United States in

canal projects for vessel transit purposes, the attached list of canals built and maintained by the United States the aggregate cost of which, it is noted, is in excess of $208,000,000. No toll charge has been suggested up to this time to cover the transit of these waterways by water-borne craft. We do not say this as a suggestion of free tolls at Panama. We only state it to show that it is not unusual for the Government to provide canal transit facilities.

The Canadian Government constructed the Welland Canal between Lakes Erie and Ontario, at a cost of approximately $132,000,000. On these waterways no transit tolls are charged to either domestic or foreign shipping. We have also prepared for the record a brief statement on the Suez and Kiel Canals, which we offer.

The rates of transit tolls at Panama are set by the President under a delegation of authority from Congress authorizing rates between certain minimum and maximum amounts. The President acts upon the recommendation from the Department of the Army. At the present time, rates of toll are 90 cents per net Panama Canal ton for laden vessels and 72 cents per net Panama Canal-ton on vessels transiting in ballast. The United States and Panamanian Government vessels and warships of the Republic of Colombia transit the Canal toll-free. All other ships of all other nations pay the established rates of toll.

Canal revenues from tolls, civil revenues, and net profits on business operations are covered into the Treasury. Funds for current operating expenses and capital construction are appropriated by Congress and for accounting purposes are considered as provided from, or as an offset against, the tolls and other receipts covered into the Treasury. Practically all receipts other than tolls, civil revenues, and business profits—that is, receipts like rent of quarters, hospital receipts, and so forth—are repayable to Canal appropriations and may be reexpended, but the reexpendable receipts are insufficient to provide for over-all costs, and the Canal is therefore required to submit its expenditure program annually to the Congress.

For the past 3 years the subject of Panama Canal tolls has been under study by congressional committees, executive departments, this federation, and others. We will not burden the record with repetition of detail data already

disclosed by these investigations. The detail is available in the printed records of the respective committees, which we respectfully suggest be incorporated herein by reference.

In general these studies have shown:

(a) That a reorganization of the Canal is desirable and necessary to provide a business-type operation and the data upon which to base toll rates;

(b) That notwithstanding the Canal's value as a national-defense asset, and notwithstanding the defense purposes which motivated its construction, and the defense savings which it has effected in war and in peace, no part of the capital cost of building or improving the basic Canal has been or is being charged to national defense in its present accounts. Interest on the entire capital investment is included in the Canal accounts which form a basis for commercial tolls;

(c) That very substantial operating expenses for schools, hospitals, highways, sewers, cemeteries, and so forth, for [fol. 132] the military and others are not reimbursed, or are not adequately reimbursed, by the military and others. Substantial sums representing the cost of operation and maintenance of these facilities are included in the accounts which form the present basis for Canal tolls;

(d) That Government vessel transits which constitute about 10 percent of all vessel transits in peacetime are entirely toll-free, the expense of the facilities which perform such transits being charged into the Canal accounts where they become a part of the commercial tolls base.

One of the studies conducted by the special subcommittee appointed to investigate Panama Canal tolls under House Resolution 44, Eighty-first Congress, first session, recommended:

That the President be requested to cause a study to be made of the organizational aspects of all phases of the Panama Canal including the Panama Railroad, and that his recommendations of suitable changes be furnished to the Congress. Inasmuch as the problem has recently been considered by the General Accounting Office and the Bureau of the Budget, it is believed that this study may be con-

cluded within the present calendar year, and, in any event, not later than January 31, 1950.

The President ordered such a study and has repeatedly deferred any tolls increases pending consideration of the recommendations by Congress.

On January 31, 1950, the Bureau of the Budget reported to the President and the President approved and transmitted to Congress a report and recommendations designed to eliminate some of the present inequities. The report recommended (a) that in the organization of the Canal, transit and business functions should be separated from civil government, health and sanitation functions and such transit and business functions should be operated by a "Panama Canal Company" on a business basis; (b) that the military and other recipients of services and facilities from the Canal Company and from the civil government should pay for the services and facilities at prices designed to reimburse cost; (c) that in lieu of taxes the net cost of health, sanitation and civil government should be borne by the Panama Canal Company on the basis of gross revenues; (d) that government vessels should pay tolls; (e) that the Panama Canal Company should be charged with interest on capital investment at a rate designed to reimburse the Treasury for its cost; that is, about 2.3 percent at the present time; and (f) that tolls should be set at rates calculated to cover the cost of operation and maintenance of the Canal, depreciation, interest on capital investment and the Canal's share of the net cost of health, sanitation, and civil government.

As amended, and as now before this committee, H. R. 8677 has been designed to implement these recommendations. The bill, as reported by the House, also gives reasonable recognition to the defense purposes of the Canal by providing for the write-off of an item of dubious validity now included in Canal capital, namely, interest during construction in an amount of $129,000,000. There is precedent in TVA accounts for not including interest during construction, TVA being the multipurpose government corporation most similar to the new Canal Company.

Some additional comment on the House item of interest during construction will be helpful to your committee. In 1921 a commission appointed by the Secretary of War—

which certainly would be sympathetic to the military side [fol. 133] of the case— allocated an amount of $113,000,000 of the capital investment to national defense. The findings of this Commission were in effect nullified by administrative action in 1932 when this national defense deduction was reincluded in the Canal capital account, and to which was also added $129,000,000 of "interest during construction."

The item itself is computed by compounding interest at 3 percent from date of each appropriation until the date of the official opening of the Canal.

Even with the deletion of this item from the capital base the Canal transit operations will return approximately $7,000,000 per annum in cash as interest to the Treasury and will contribute approximately $4,000,000 to the net cost of health, sanitation, and civil government under the bill. The Bureau of the Budget has indicated that the compromise deletion of this amount is acceptable.

The United States shipping industry as represented by the Federation is quite prepared to pay tolls for the transit of commercial ships based upon the cost of performing the service under good accounting practices and including interest at rates suggested by the Bureau of the Budget on a capital investment as provided in the bill. We are not suggesting that the taxpayers of the United States provide funds to defray the cost of transiting commercial vessels. We do object to having this traffic burdened with military and other expenses unrelated to commercial transits and the bill covers that satisfactorily.

A policy of setting toll rates at amounts which would cover the cost of operation of the Canal and all services reasonably accessory thereto would be fair and equitable to shipping and to the Government, and an aid to the American merchant marine. Such a policy would be of particular assistance in the intercoastal trades which are having a difficult fight for revival.

Before World War II as many as 145 dry-cargo ocean-going steamships under private ownership plied these routes and constituted a substantial segment of American shipping.

Due to changed economic conditions American shipping companies have not found it possible to restore these serv-

ices except in a small way. Today only 40 privately-owned vessels—compared with 145 in 1-39—are operating between these ports.

The setting of tolls in acordance with H. R. 8677 would not result in any burden on the United States for the operation and maintenance of the Panama Canal and its necessarily related activities. It would simply amount to a fair recognition of its national security characteristics, and a proper reduction of the costs heretofore, in our opinion, improperly assessed against commercial shipping.

We urge prompt passage of the bill in the interest of expediting this highly desirable reorganization and in order that a fair and equitable tolls policy may be fixed by Congress.

The Merchant Marine and Fisheries Committee of the House stated of the legislation:

Your committee believes that legislation reorganizing the Panama Canal and establishing tolls policy has long been needed. Since it will require at least a year to effect the changes proposed by the bill, it is recommended that this legislation be given early consideration.

That comprises my statement.

Senator Byrd. The total cost was $534,000,000?

Mr. Seidman. Total capital investment at the present time.

[fol. 134] Senator Byrd. Does that include interest?

Mr. Seidman. During construction. I want to clarify one point of interest during construction. The interest during construction has been computed on a compound interest basis. The General Accounting Office has criticized that as being unsound. You do not compute interest during construction on a compound basis, and they have recommended that be computed on a simple interest basis.

I can give you the figure. I think this is a more realistic figure of what we are taking out. Interest during construction, as recomputed or recalculated by the General Accounting Office on a simple interest basis, is $115,000,000.

So actually what we are taking out from the investment base is $115,000,000 rather than $129,000,000.

Senator Byrd. That would leave $419,000,000 on which you would collect interest?

Mr. Seidman. No. They would be taking out the investment in civil Government facilities. They have been collecting interest on schools, hospitals, and civil government structures. Those would be taken out of the investment base. The capital investment subject to interest—again, these are a guess—if you took out interest during construction, it would be somewhere around $325,000,000, on which you would be paying interest.

Senator Byrd. $325,000,00-?

Mr. Seidman: That is a very rough guess.

[fol. 135] Calendar No. 2535

81st Congress, 2d Session Report No. 2531

SENATE

AUTHORIZING AND PROVIDING FOR THE MAINTENANCE AND OPERATION OF THE PANAMA CANAL BY THE PRESENT CORPORATE ADJUNCT OF THE PANAMA CANAL, AS RENAMED; TO RECONSTITUTE THE AGENCY CHARGED WITH THE CIVIL GOVERNMENT OF THE CANAL ZONE, AND FOR OTHER PURPOSES.

September 8 (legislative day, July 20), 1950.—Ordered to be printed

Mr. Byrd, from the Committee on Armed Services, submitted the following

REPORT

[To accompany H. R. 8677]

The Committee on Armed Services, to whom was referred the bill (H. R. 8677) to authorize and provide for the maintenance and operation of the Panama Canal by the present corporate adjunct of the Panama Canal, as renamed; to reconstitute the agency charged with the civil government of the Canal Zone, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill, as amended, do pass.

[fol. 136] Purpose of the Bill

The purpose of this bill, as amended, is to improve the organization of the Panama Canal and to establish an equitable and proper base for the collection of tolls.

Explanation of the Amendments

With one exception, all of the amendments listed above are technical or clarifying in character and do not change in the slightest degree the substance of the proposed legislation.

The new section 3 which has been inserted is very lengthy but is a technical amendment to make certain that the bill contains a proper provision for the payment of damages and claims in the event of injuries for which the Panama Canal Company is liable. This amendment is almost identical with the present law with the exception that the limit on the amount of payment which is contained in the present law has been removed. One amendment of substance has been made by the committee. The House wrote in an amendment which would have placed a limit of $1 per net vessel-ton on the rate of tolls which could be charged. Such a limitation is entirely inconsistent with the principles of this legislation, since the bill establishes a method of calculating tolls at such a level as will make the Panama Canal self-supporting. The institution of an arbitrary ceiling could quite readily result in the Canal being forced to operate at a loss.

Explanation of the Bill, As Amended

Basically, the primary purpose of the bill is to separate the business operations of the Panama Canal from those collateral operations which make up the governmental activities of the Panama Canal administration. Tolls will be calculated in accordance with a formula written into the law which will result in the operation of the Canal on a self-sustaining basis. Interest will be charged at a going rate which is approximately 2.3 percent at the present time on the capital investment in the Panama Canal and this interest must be paid into the Treasury of the United States. In addition to paying for the cost of operating and maintaining the Canal, it is estimated that about 50

percent of the cost of the civil government would be supported by the tolls collected from transit vessels. The remainder of the cost of the civil government would be borne by the other business activities, such as hotels, commissaries, etc. As a result, the Canal will be on a self-sustaining basis and the other collateral businesses operating in the Canal Zone must bear their proportionate share of the cost of the civil government, health, and sanitation.

Several changes have been made in the formula used in calculating tolls. For the first time transit military and Government vessels will be charged when they pass through the Canal. This will not be an actual payment but will be a credit on the books of the Canal Company. In addition, subsection E of section 412 of the Canal Zone Code has been amended to provide that interest on construction costs shall be eliminated in calculating tolls. This principle is the same as is followed by the Tennessee Valley Authority in fixing their rates for power, and other similar Government projects. This means that the Government con- [fol. 137] tinues to include the Panama Canal as one of the capital assets of the United States of America. It is valuable as part of the national defense of our country and has proved itself as an asset for commercial purposes. By so recognizing the national defense aspects, interest on construction costs can be deducted from current maintenance charges for the purpose of fixing tolls.

It is believed that once these changes are made there can be, for the first time, an accurate assessment of the business affairs of the Company, and it will be unique in the Government service in that a corporation will be paying interest into the Treasury and at the same time operating on a self-sustaining basis. The committee inquired into the effect of this legislation on the existing tolls which are now set at 90 cents a vessel-ton, as well as the amount of interest that would be paid into the Treasury under the new bill. This interest figure is of particular significance because little or no interest on capital investment has been paid into the Treasury under the old law.

Testimony of the representatives of the Bureau of the Budget indicated that under prevailing conditions the application of the provisions of this bill, as amended, would

probably result in a tolls rate of about 95 cents per net vessel-ton.. This is derived from the following data:

Revenue	
Commercial tolls	$24,000,000
Government transits, (now exempt)	2,500,000
Other outside revenue	2,300,000
Total	28,800,000

Expense	
Expense	18,500,000
Allocation of proportionate share of cost of Canal Zone Government	3,700,000
Interest (to be paid into Treasury)	8,000,000
Total	30,200,000

Net loss at 90 cents a ton rate, $1,400,000.

An increase of tolls to 95 cents a ton would produce additional revenues of $1,400,000 a year if Canal traffic averages 28,000,000 tons a year as at present.

All of the above figures are stated in round numbers and are based on currently available financial data. The toll rate will, of course, be affected by any future changes in operating costs, interest rates, and Canal traffic and may be revised either up or down.

This bill is recommended by the Department of Defense and the Secretary of the Army in his capacity as the presidential representative in administering the Panama Canal, as is shown in the following letter from the Secretary to the chairman of the Senate Armed Services Committee, the Bureau of the Budget, the Governor of the Panama Canal, the Steamship Owners Association, and, with the amendment removing the arbitrary ceiling, the Association of American Railroads.

[fol. 138] Chapter 23.—Tolls for Use of Canal

411. Authority [of President] to Prescribe [and Change] *Measurement Rules and* Tolls.—The *Panama Canal* Company is authorized [subject to the provisions of the section

next following] to prescribe and from time to time change *(1) the rules for the measurement of vessels for the Panama Canal, and (2), subject to the provisions of the section next following,* the tolls that shall be levied [by the Government of the United States] for the use of the Panama Canal [, but no tolls when prescribed as above shall be changed unless six months' notice is given by the President by proclamation.] *: Provided, however, That the rules of measurement, and the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section: Provided further, That the said corporation shall give six months' notice, by publication in the Federal Register, of any and all proposed changes in rates of tolls, during which period a public hearing shall be conducted: And provided further, That changes in basic rules of measurement and changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive.*

412. Bases of Tolls [; Maximum and Minimum Rates].

—(*a*). Tolls on merchant vessels, army and navy transports, colliers, *tankers*, hospital ships, supply ships, and yachts shall be based on net vessel-tons of one hundred cubic feet each of actual earning capacity determined in accordance with the [Rules] *rules* for the [Measurement] *measurement* of [Vessels] *vessels* for the Panama Canal, [prescribed by the President and as may be modified by him from time to time by proclamation,] and tolls on other floating craft shall be based on displacement tonnage. [Provided, That the basic rules of measurement shall not be changed except after public hearing and six months' public [fol. 138a] notice of such change. The rate of tolls on laden vessels shall not exceed, $1 nor be less than $0.75 per net vessel-ton as determined under the aforesaid rules, and] *The rate of tolls* on vessels in ballast without passengers or cargo [the rate] may be less than the rate of tolls for vessel with passengers or cargo. [In addition to the tolls based on measurement or displacement tonnage, tolls may be levied on passengers at rates not to exceed $1.50 for each passenger.]

(b) Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including interest and depreciation; and an appropriate share of the net costs of operation of the agency known as the Canal Zone Government. In the determination of such appropriate share, substantial weight shall be given to the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government.

(c) Vessels operated by the United States, including warships, naval tenders, colliers, tankers, transports, hospital ships, and other vessels owned or chartered by the United States for transporting troops or supplies, may in the discretion of the President of the United States be required to pay tolls. In the event, however, that such vessels are not required to pay tolls, the tolls thereon shall nevertheless be computed and the amounts thereof shall be treated as revenues of the Panama Canal Company for the purpose of prescribing the rates of tolls, and shall be offset against the obligations of the said corporation under paragraphs (c) and (e) of section 246 of this title, as amended.

(d) The levy of tolls is subject to the provisions of section 1 of article *III of the treaty between the United States of America and Great Britain concluded on November 18, 1901, of articles XVIII and XIX of the convention between* the United States of America and the Republic of Panama [entered into] *concluded on* November 18, 1903, and of article I of the treaty between the United States of America and the Republic of Columbia proclaimed on March 30, 1922.

(e) Capital investment for interest purposes shall not include any interest during construction.

[fol. 139] EXHIBIT "E" TO MOTION

First Annual Reports of the Panama Canal Company and the Canal Zone Government for the Fiscal Year Ended June 30, 1952

[fol. 140] INTRODUCTION

The Waterway

The Panama Canal is a lock-type canal that connects the Atlantic and the Pacific Oceans through the Isthmus of Panama, traversing a distance of approximately 51 miles from deep water to deep water. In the dredged channel the canal has a minimum width of 300 feet and a minimum depth of 42 feet. The greatest part of the canal channel is at the level of Gatun Lake, the surface of which is 85 feet above sea level. In transiting the canal a ship is raised in three steps or lockages to the level of Gatun Lake and subsequently lowered in 3 steps to sea level at the other side of the isthmus. Each of the twin chambers in each flight of locks has a usable length of 1,000 feet and width of 110 feet, and is about 70 feet deep. The flights are in duplicate, enabling ships to be passed in opposite directions simultaneously.

The Company

The Panama Canal Company which now operates the Panama Canal and its related business-type activities is a corporate agency of the United States created (reincorporated) as the Panama Railroad Company by Public Law 808, 80th Congress, enacted June 29, 1948, and renamed under the provisions of Public Law 841, 81st Congress approved September 29, 1950. The original Panama Railroad Company, chartered in 1849 under the laws of the State of New York, had been acquired by the United States Government through the purchase of the assets of the new Panama Canal Company from the French in 1904.

Effective July 1, 1951, under the provisions of Public Law 841, and pursuant to Executive Order 10263 of June 29, 1951, the maintenance and operation of the Panama Canal and the facilities and appurtenances related thereto were assumed by the Panama Canal Company by transfer from the noncorporate agency known as the Panama Ca-

nal. That agency was renamed the Canal Zone Government, and is charged now exclusively with the functions of civil government, which include responsibilities for health, sanitation, and protection of the Canal Zone. The Company and the Canal Zone Government are closely interrelated in purposes, organization, and operations, and the function of the two agencies in combination is the administration of the Panama Canal enterprise as a whole. The Canal Zone is required by law to be held, treated, and governed as an adjunct of the Panama Canal. The Governor of the Canal Zone who is charged with the administration of the Canal Zone Government, under the supervision of the Secretary of the Army, is ex officio a director and president of the Panama Canal Company.

Under Public Law 841 the Company is required to be self-sustaining and to reimburse the United States Treasury for the net cost of administering the Canal Zone Government and, as nearly as possible, for the interest on the net direct investment of the United States in the corporation. [fol. 141] The interest rate for the fiscal year 1952 was set by the Secretary of the Treasury in conformity with law at 1.95 percent. The law also authorized appropriations to cover losses sustained in the conduct of the Company's business as well as appropriations in the form of interest-bearing advances for capital needs.

The management of the Company is vested in a board of directors appointed by the Secretary of the Army in his capacity as stockholder, and is charged with the maintenance and operation of the Panama Canal and the conduct of auxiliary operations incident thereto and incident to civil government of the Canal Zone.

In this report and for accounting purposes generally, the activities of the Company are classified under four major headings, namely: (*a*) canal activities; (*b*) commercial activities; (*c*) employee service activities; and (*d*) other service activities. Canal activities comprise those functions directly related to the waterway and transiting of ships, such as the marine operation, maintenance of the canal channel, operation and maintenance of the locks, meteorology and hydrographic work, and ferry service across the canal at Balboa. Commercial activities consist of a railroad across the isthmus, marine bunkering facili-

ties, a hotel, a steamship line operating between New York and the Canal Zone, and cargo-handling activities, including operations of the docks and piers. Employee service activities are those essential to employees' needs and which were established primarily for that purpose; they consist of the operation of quarters, commissaries, and so-called clubhouses. Other service activities are those established primarily for serving the needs of the Company but which may also serve employees, other agencies, and the public; they include industrial shops and drydocks, construction and maintenance units, motor-transportation facilities, printing plants, storehouses, the electric power, water, and telephone systems, garbage collection, and transient quarters for those having official business on the isthmus (Tivoli Guest House).

[fol. 142] EXHIBIT "F" TO MOTION

83d Congress, 2d Session House Document No. 476

Second Annual Reports of the Panama Canal Company and the Canal Zone Government for the fiscal year ended June 30, 1953

[fol. 143] Summary of Financial Results

The financial report and financial statement for the year ended June 30, 1953, appear in chapter V. It has been necessary again this year to report the properties transferred from The Panama Canal (agency) on July 1, 1951, the Government's equity therein, and the corresponding depreciation and interest accruals at tentative amounts which may be substantially changed upon the completion of the plant inventory and appraisal program currently underway. While traffic passing through the canal exceeded that of any year in the canal's history, it must be remembered that it was stimulated by the effects of war in Korea, rearmament at home and abroad, and other abnormal world conditions arising from international tensions such as the abnormal flow of petroleum stemming from the shutdown of Iranian production. This caused a substantial increase in revenues for 1953. As a result, the excess of revenues over expenses as presently com-

puted increased and has been tentatively figured at $7.2 million dollars after provision for interest and all other obligations of the Company. It is estimated that this figure will be reduced to approximately $5.6 million when full effect is given to evaluation adjustments now in the course of development.

[fol. 144] EXHIBIT "G" TO MOTION

84th Congress, 1st Session House Document No. 108

Third Annual Reports of the Panama Canal Company and the Canal Zone Government for the Fiscal Year Ended June 30, 1954

[fol. 145] The Panama Canal Company is expected *(a)* to recover all costs of operation and maintenance of its facilities, including depreciation, *(b)* to pay interest to the Treasury on the net direct investment of the Government in the Company, and *(c)* to reimburse the Treasury for (1) the annuity payments to the Republic of Panama under the Convention of 1903 as modified by the Treaty of 1936 between the two Governments, and (2) the net costs of operation of the Canal Zone Government including depreciation on fixed assets. The interest rate for the fiscal year 1954, as set by the Secretary of the Treasury, was 2.342 percent. The Board of Directors is required to appraise, at least annually, the Company's working capital requirements, together with reasonable foreseeable requirements for authorized plant replacement and expansion, and to pay into the Treasury as a repayment of capital the amount of any funds in excess of such requirements. All funds other than working balances are carried with the United States Treasury.

In this report and for accounting purposes generally, the activities of the Company are classified under two major headings, namely: (1) the Canal and allied maritime operations, and (2) supporting operations. Category (1) embraces those functions directly related to the waterway and the transiting of ships and to services to shipping, including maintenance of the canal channel, maintenance and operation of the locks, meteorology and hydrographic serv-

ices, a ferry service across the canal at Balboa, vessel repairs, harbor terminal operations, and the operation of the Hotel Washington. The supporting operations include a railroad across the isthmus, a steamship line operating between New York and the Canal Zone, motor transportation facilities, storehouses, an electric power system, a water system, a communication system, and service activities that are essential to employees' needs including the operation of quarters, commissaries, and service centers.

[fol. 146] Nationality of Vessels Transiting Canal

Thirty-three nationalities were represented in the oceangoing commercial traffic passing through the canal in the fiscal year 1954, one less than in the preceding year. Vessels of United States registry, accounting for 11,613,431 net vessel tons, again ranked first among the various flags represented in the transit statistics. Vessels of British registry traditionally rank second in importance in canal traffic and retained that position in 1954, with net vessel tonnage totaling 7,330,847. Traffic of both these two leading maritime nations was under the 1953 figures.

United States vessels made up 30.5 percent of the total net tonnage during fiscal year 1954; British, 19.3 percent; Norwegian, 10.5 percent; Panamanian, 7.2 percent; Japanese, 5.7 percent; Danish, 3.1 percent; Swedish, 2.8 percent; Liberian, 2.7 percent; and Italian, 2.7 percent.

Further particulars on traffic by nationality will be found in table 13, chapter V, page 62.

[fol. 147] Bills Pending

Bills pending in the Congress as of the close of fiscal year 1954 that would apply to the Canal Zone generally or to the Canal Zone Government or Panama Canal Company (other than appropriation bills and bills that, because of their provisions, have general application to the Canal Zone and/or to the Canal agencies) included the following:

A bill (H. R. 9665) that would provide for amendment of tolls section 412 (b) of title 2 of the Canal Zone Code, and addition of section 246 (f) in said title in order to provide for the amortization and depreciation of fixed assets transferred to the Corporation that were treated as nondepreciable prior to July 1, 1951.

A bill (H. R. 9583) that would repeal section 412 (c) of title 2 of the Canal Zone Code, in order to include interest during construction in capital investment for interest purposes.

Two bills (H. R. 9427 and H. R. 9681) that would amend sections 246, 247, and 412 of title 2 of the Canal Zone Code, in order to reduce the overall burden of the Company (and thus the burden borne by tolls) in several important respects.

Two identical bills (H. R. 9429 and H. R. 9433), that would amend section 412 (b) of title 2 of the Canal Zone Code (that tolls section) so as to redistribute the corporate burden internally in order to shift a relatively larger portion of the burden on the tolls activity, and, correspondingly, to decrease the portion of overall obligations which is to be borne by other activities of the Company.

[fol. 148]

CHAPTER V

Financial Report and Statistical Data

Financial Report for Fiscal Year Ended June 30, 1954

The financial statements of the Panama Canal Company, appearing in tables numbered 1 through 10, fairly present the financial position of the Company at June 30, 1954, and the results of its operations for the fiscal year then ended in accordance with generally accepted accounting principles, subject to the qualifications appearing in the notes accompanying the statements.

Certain assets, liabilities, and related net direct investment of the Government acquired by transfer from the former Panama Canal agency on or prior to July 1, 1951, are in process of valuation as required by law. The work is nearing completion and it is believed that all major valuation adjustments, except possibly those relating to excess inventories and liability for alien cash relief, have been reflected in the accounts. It must be recognized, however, that further adjustments will be made and that the entire valuation is subject to final review and approval by the Board of Directors and the Director of the Bureau of the Budget. Any changes in these valuations will affect

the provisionally reported depreciation and interest accruals and net income for the period since July 1, 1951.

In addition, there has been submitted to the Congress by the Company certain draft legislation which, if enacted, would further change depreciation, amortization, and interest requirements of the Company retroactive to July 1, 1951. Under existing legislation, the cost of the canal channel, capitalized interest during construction, and certain other costs of fixed assets are not subject to allowance for depreciation or amortization. The proposed legislation would authorize and require such depreciation or amortization and, in addition, would include the amount of interest during construction in the interest-bearing investment of the Government.

The Company's accounting practices for fiscal year 1954 are generally consistent with those of the preceding year, except that (1) administrative and certain other general expenses previously allocated to operating expenses are now considered general corporate charges and are not distributed in the accounts, (2) the principle of group depreciation allowances was adopted under which gain or loss is not generally recognized on retirement of individual items of property, and (3) new rates of depreciation were adopted for various classes of plant as a result of the valuation study.

Government's Investment

The property valuation and working capital adjustments recorded during the year as a result of the appraisal program have served to increase the tentatively stated net direct investment of the Government from $376,204,276, as reported last year, to $377,764,946.

[fol. 149] The net effect of these adjustments, and others made during fiscal years 1952 and 1953, on the assets and liabilities transferred from the Panama Canal (agency) appear on table 10. The principal revisions made during 1954 are summarized as follows:

	Increase (decrease) in net direct investment
Net increase in working capital	$973,540
Net increase in fixed assets:	
Gross plant:	
Improvements to canal channel through June 30, 1951 (previously charged to operations)	34,097,996
Reclassifications of plant and equipment from defense and idle plant to plant in service	8,242,252
Other miscellaneous adjustments to plant in service	754,501
Total increase in gross plant	43,094,749
Allowance for depreciation and economic valuation:	
Establishment of 100 percent allowance for economic valuation against capitalized interest during construction	(50,892,311)
Reduction in depreciation accumulated to June 30, 1951, to give effect to revised service lives and use of mortality methods of calculation	11,283,917
Allowance for depreciation on plant and equipment reclassified from defense and idle plant to plant in service	(2,109,850)
Other miscellaneous adjustments to allowance for depreciation and economic valuation	(789,375)
	(42,507,619)
Net increase in fixed assets	587,130
Net increase in direct investment	1,560,670

As shown on table 10, the net effect of the foregoing adjustments was to increase the interest-bearing portion of the Government's investment by $52,452,981. The investment in capitalized interest during construction, for which a 100 percent valuation allowance was established in 1954, was not interest bearing, under the provisions of section 412 (e) of title 2 of the Canal Zone Code, as amended.

[fol. 150]

TABLE 2.—ANALYSIS OF EQUITY OF U. S. GOVERNMENT, JUNE 30, 1954 AND 1953

	1954	1953
NET DIRECT INVESTMENT:		
Capital stock of original Panama Railroad Company (N. Y.)	$ 7,000,000	$ 7,000,000
Tentative valuations of properties and other assets, less liabilities, transferred from the Panama Canal (note 1):		
Car shops and roundhouses, Feb. 1, 1950	190,651	232,182
Oil plants, docks and piers, July 1, 1950	5,579,441	3,015,582
Canal and other facilities, and net working capital, July 1, 1951	400,749,715	401,711,373
Tentative transfer valuation (table 10)	406,519,807	404,959,137
Gross direct investment, as tentatively stated, June 30, 1954 and 1953	413,519,807	411,959,137
Less dividends and other charges deductible from direct investment:		
Dividends paid to U. S. Treasury, 1904 to 1950 (note 6)	23,994,905	23,994,905
Appraised value of lands conveyed to Republic of Panama without reimbursement, Dec. 16, 1943	11,759,956	11,759,956
Total deductions	35,754,861	35,754,861
Net direct investment (as defined by Panama Canal Company Act, as amended), as tentatively stated at June 30, 1954 and 1953 (note 6 and table 1)	377,764,946	376,204,276
RETAINED INCOME:		
Balances at July 1, 1953 and 1952, as previously reported	83,554,357	74,373,329
Net income for years ended June 30, 1954 and 1953, as tentatively stated (table 3)	4,160,010	7,200,963
Adjustments to prior years' stated net income:		
Changes in interest payable to U. S. Treasury for prior years arising from revisions to valuation of net direct investment	(2,098,119)	19,469
Additional provision for overhaul of Gatun Locks applicable to prior years	(399,601)	
Capitalization of equipment charged to expense in prior years and other adjustments to fixed assets and related depreciation and obsolescence allowances, net	(285,036)	18,199
Capitalization of channel improvements charged to expense in 1952		1,885,654
Other adjustments, net	101,221	56,743
Balances at June 30, 1954 and 1953, as tentatively stated (table 1)	85,032,832	83,554,357
TOTAL EQUITY, JUNE 30, 1954 AND 1953, AS TENTATIVELY STATED (note 6)	462,797,778	459,758,633

The accompanying "Notes Pertaining to the Financial Statements" are an integral part of this statement.

[fol. 151]

TABLE 3.—INCOME STATEMENT, YEAR ENDED JUNE 30, 1954

	Total	Canal and other marine operations (table 4)	Allied maritime operations (table 5)	Supporting service operations (table 6)
REVENUE:				
Canal tolls	$33,302,149	$33,302,149		
Credit for tolls on U. S. Government vessels	3,888,957	3,888,957		
Sales of commodities	26,136,169			$26,136,169
Sales of services	20,643,557	2,874,650	$6,532,620	11,236,287
Rental of quarters	2,424,345			2,424,345
Total revenue	86,395,177	40,065,756	6,532,620	39,796,801
OPERATING EXPENSES:				
Direct expenses including cost transfers	48,700,739	14,326,406	6,464,846	27,909,487
Cost of commodities sold and transferred	22,002,671			22,002,671
Allowance for depreciation	4,610,744	1,777,491	479,325	2,353,928
Total operating expenses	75,314,154	16,103,897	6,944,171	52,266,086
Less costs transferred to other activities	17,250,035	301,982	1,929,571	15,018,482
Net operating expenses	58,064,119	15,801,915	5,014,600	37,247,604
OPERATING INCOME	28,331,058	24,263,841	1,518,020	2,549,197
GENERAL CORPORATE EXPENSE:				
Net cost of Canal Zone Government (table 3—Canal Zone Government)	10,366,079			
Interest payable to U. S. Treasury (tentative)	8,847,255			
Administrative and other general expenses (table 7)	4,957,714			
Total	24,171,048			
NET INCOME, AS TENTATIVELY STATED (table 2)	4,160,010			

The accompanying "Notes Pertaining to the Financial Statements" are an integral part of this statement.

[fol. 152] Notes Pertaining to Financial Statements for Year Ended June 30, 1954

1. *Valuation of Fixed Assets.*—Fixed assets are stated at cost to the Company or other Government agency originally acquiring them. Valuation allowances provide for accrued depreciation on a straight-line basis and reflect economic value of the assets to the Company where necessary. The basis for net valuation of assets transferred to

the Company from the Panama Canal agency, as prescribed by section 246 of title 2 of the Canal Zone Code, as amended, involves consideration of the cost and probable earning power and other factors affecting the usable value to the Company. The valuation so determined for such assets is subject to the approval of the Director, Bureau of the Budget. Substantial adjustments to the values of the transferred and other fixed assets included in the accompanying balance sheet have been developed and applied in accordance with valuation policies approved by the Bureau of the Budget. The inventory and revaluation work is not complete and the amounts thus far recorded have not been reviewed or approved by the Director of the Bureau of the Budget. The remaining adjustments to fixed assets, however, are not expected to be substantial in relation to the total valuation unless pending proposals for legislative changes are enacted.

The legislation proposed would authorize the accumulation of depreciation on the Canal channel and certain other assets heretofore classified as nondepreciable, the amortization of the costs of certain lands, titles, and treaty rights, and would include the capitalized interest during construction in the interest-bearing investment of the Government. If these changes are made it is estimated that the valuation of properties transferred to the Company and the resulting interest-bearing investment of the Government would be decreased approximately $62 million by the retroactive application of depreciation to the channel and similar costs less the interest during construction that would be added to the investment. Annual interest charges would therefore be reduced by approximately $1.5 million at the 1954 rate, but annual charges for depreciation and amortization would be increased approximately $3.4 million.

2. *Inventories.*—Inventories of materials, supplies, equipment parts and merchandise for resale are valued generally at average cost landed at the isthmus less an allowance of $512,660 representing the cost of certain obsolete materials and supplies acquired by transfer from the Panama Canal agency. Materials and supplies include substantial but undetermined amounts of spare equipment parts and materials in long supply which will not be used within the next several fiscal years at current levels of operation.

3. *Emergency Fund.*—The emergency fund of $10 million was established in the United States Treasury in accordance with the requirements of law by the Company's corporate predecessor and transferor, the Panama Railroad Company (New York). The Company has the right to "borrow" these funds at any time for limited periods without interest, and repayments are available for subsequent "loans."

4. *Defense and Idle Plant.*—Defense facilities and incomplete and excess plant held by the Panama Canal agency were transferred to the Company as of July 1, 1951. The principal items in this classification relate to the partial construction of a third set of locks, which project was abandoned in the early part of World War II, and the special facilities installed in the interests of national defense. Pursuant to the provisions of section 246 of title 2 of the Canal Zone Code, as amended, these properties were transferred to the Company at no net value by establishment of economic valuation allowances equaling 100 percent of cost. The original cost of some of these properties has not yet been determined or set up in the accounts. To the extent that facilities acquired or constructed as part of the third locks and special defense projects are utilized in operations of the Company such properties are carried in plant in service with economic valuation allowances sufficient only to offset any excess costs due to defense features or to recognize marginal utility.

5. *Contingent Liabilities.*—At June 30, 1954, the Company had outstanding a substantial amount of contingent and continuing liabilities, not reflected in the accounts, arising principally from monthly relief benefits payable to retired alien employees, compensation payments due employees and their dependents under the provisions of the Federal Employees' Compensation Act, suits and claims pending against the Company, uncompleted supply, service, rental, and construction contracts, and unfilled purchase orders. In June 1954 monthly relief benefits to retired alien employees were at an annual rate of $1.7 million which, according to a recent actuarial survey, will increase for the next few years owing to the expected excess of accessions to the relief rolls over deaths and other with- [fol. 153] drawals. Outstanding law suits aggregated $3.5

million, but in the opinion of the Company will be settled for a substantially lesser amount. Commitments under uncompleted construction contracts amounted to $4.4 million.

6. *Equity of United States Government.*—The equity of the Government in the Company is stated in accordance with the method prescribed by section 246 of title 2 of the Canal Zone Code, as amended (see table 2). The net direct investment is subject to further revision as a result of pending appraisal adjustments in the valuation of assets and liabilities transferred to the Company and proposed legislative changes as indicated in note 1. In addition the net direct investment was reduced in November 1954 by the further payment of a liquidating dividend to the Treasury in the amount of $10 million.

The rate at which the Company is required to pay interest to the Treasury on the net direct investment is established annually by the Secretary of the Treasury. Since the date when interest has been payable these rates for each fiscal year have been: 1952, 1.95 percent; 1953, 2.05 percent; 1954, 2.342 percent; 1955, 2.43 percent (see table 10 for interest-bearing investment).

[fol. 154]

TABLE 13.—CANAL TRAFFIC,[1] BY NATIONALITY OF VESSELS

Nationality	Number of transits	Measured tonnage: Panama Canal net	Measured tonnage: Registered Gross	Measured tonnage: Registered Net	Tolls	Tons of cargo
Argentine	1	5,016	5,362	3,147	$4,514.40	7,555
Belgian	10	26,207	32,627	21,809	21,468.60	12,733
British	1,265	7,330,847	9,752,498	5,794,072	6,489,389.18	7,726,640
Chilean	78	417,850	599,299	341,352	364,674.94	429,245
Chinese	19	75,191	105,240	63,847	69,384.36	130,112
Colombian	205	484,524	608,757	327,193	435,128.48	240,640
Costa Rican	40	208,011	286,930	189,040	176,013.36	259,137
Danish	275	1,167,889	1,348,004	758,564	1,034,593.74	935,878
Ecuadoran	106	170,825	247,418	136,371	155,136.56	92,932
Finnish	2	13,620	20,764	12,152	11,032.20	14,828
French	136	682,389	884,445	504,728	631,217.84	582,989
German	323	975,176	998,509	567,744	851,910.48	708,338
Greek	146	749,441	1,002,851	614,869	665,990.46	1,246,534
Honduran	347	804,603	1,295,002	757,369	674,091.54	493,260
Irish	3	11,574	12,918	7,140	10,416.60	17,593
Israel	5	23,358	35,886	21,621	22,822.20	43,710
Italian	211	1,029,208	1,389,722	837,617	908,937.72	1,159,700
Japanese	387	2,162,693	2,875,320	1,688,690	1,940,831.82	2,481,494
Korean (South)	8	30,042	42,728	25,538	25,858.44	25,125
Liberian	224	1,040,175	1,415,845	896,773	890,094.78	1,416,303
Mexican	2	1,366	2,136	1,240	1,229.40	2,577
Moroccan	1	7,527	10,627	6,292	6,774.30	14,401
Netherland	130	690,656	930,553	548,127	605,356.96	684,932
Nicaraguan	25	35,968	43,575	19,362	32,371.20	26,469
Norwegian	831	3,980,903	4,652,075	2,742,683	3,431,126.88	3,484,070
Panamanian	611	2,753,650	3,766,357	2,277,329	2,356,325.82	3,666,133
Peruvian	25	62,844	90,906	54,117	57,367.30	54,907
Philippine	27	153,773	179,028	106,940	138,395.70	154,356
Spanish	41	169,749	213,600	135,075	138,849.30	171,304

TABLE 13.—CANAL TRAFFIC,[1] BY NATIONALITY OF VESSELS—Continued

Nationality	Number of transits	Measured tonnage: Panama Canal net	Measured tonnage: Registered Gross	Measured tonnage: Registered Net	Tolls	Tons of cargo
Swedish	230	1,063,160	1,301,359	931,324	933,781.86	818,911
Swiss	11	64,487	61,508	35,928	58,038.30	92,845
United States	2,056	11,613,431	15,574,178	9,138,079	10,087,045.74	11,867,848
Yugoslav	3	19,659	23,859	14,106	17,693.10	31,568
Totals:						
1954	7,784	38,027,812	49,809,886	29,580,238	33,247,863.56	39,095,067
1953	7,410	36,678,636	48,315,051	28,697,741	31,917,515.06	36,095,349

[1] Includes only commercial vessels of 300 net tons and over, Panama Canal measurement, or of 500 displacement tons and over on vessels paying tolls on displacement basis (dredges, warships, etc.).

NOTE.—In canal traffic statistics, foreign naval vessels such as transports, supply ships, tankers, etc., with a measurement of 300 net tons (Panama Canal measurement) and over, and vessels of war, dredges, etc., with a displacement of 500 tons and over, are classified as ocean-going commercial vessels. Statistics on these vessels, except such as pertain to displacement tonnage, have been included in the traffic summaries shown in the preceding table. The following table presents by nationality statistics on the 26 vessels which transited the canal during the fiscal year 1954 and paid tolls on displacement tonnage.

Nationality	Type	Number of transits	Displacement tonnage	Tolls
British	Naval	9	72,094	$36,047.00
Chinese	do	2	5,280	2,640.00
Chilean	do	1	5,000	2,500.00
Colombian	Dredge	1	736	368.00
Ecuadoran	Naval	2	4,015	2,007.50
French	do	8	38,134	19,067.00
Netherland	do	1	1,781	890.50
Peruvian	do	2	3,770	1,885.00
Total		26	130,810	65,405.00

[fol. 155] JUDGE'S NOTE RE MOTION

Jan. 5, 1956

Motion marked "off" pending decision by Judge Walsh on motion in the matter now before him.

Alexander Bicks, U. S. D. J.

[fol. 156] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

MOTION TO DISMISS COMPLAINT—Filed Dec. 16, 1955

SIRS:

Please take notice that upon the annexed affidavit of Leavenworth Colby, sworn to December 15, 1955 and the complaint herein, the undersigned will move this Court at a Stated Term for Motions thereof, to be held at the United States Court House, Room 506, Foley Square, in the Borough of Manhattan, City of New York, on the 22nd day of December, 1955, at 10 o'clock in the forenoon of said day or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 12(b) subdivisions 1 and 7 of the Federal Rules of Civil Procedure, dismissing the complaint on the grounds that

(1) this Court lacks jurisdiction over the subject matter of this action;

(2) the plaintiff has failed to join an indispensable party;

and for such other and further relief as to the Court may seem just in the premises.

Dated: New York, New York, December 16, 1955.

Yours, etc., Warren E. Burger, Assistant Attorney General, Attorney for Defendant, Appearing Specially, Office & P. O. Address 607 U. S. Court House, Foley Square, New York 7, N. Y.

To: Maclay, Morgan, & Williams, Esqs., Attorneys for Plaintiffs, 76 Beaver Street, New York 5, New York.

[fol. 157] DISTRICT OF COLUMBIA,
City of Washington, ss:

AFFIDAVIT OF LEAVENWORTH COLBY IN SUPPORT OF MOTION TO DISMISS

Leavenworth Colby, being duly sworn, deposes and says:

I am Chief of the Admiralty and Shipping Section of the Department of Justice and am familiar with all of the proceedings heretofore had in the above-entitled action.

This is an action on behalf of the class of shipowners using the Panama Canal to recover $27,836,504 for allegedly excessive and illegal toll charges collected by the defendant for the use of the Canal for the period July 1, 1951 to June 30, 1954. The complaint further demands mandatory and prohibitory injunctions requiring the defendant to take steps to reduce the present toll rates. The complaint was filed on September 13, 1955.

[fol. 158] According to the third paragraph of the complaint, jurisdiction in this action is founded upon the Act of June 29, 1948, 62 Stat. 1076 (Public Law 808, 80th Congress, Second Session) and the Act of September 26, 1950, 64 Stat. 1041 (Public Law 841, 81st Congress, Second Session). These laws appear in the Canal Zone Code but not in the United States Code.

I submit this affidavit in support of the defendant's motion to dismiss the complaint.

As appears from sec. 2 of Public Law 808 (62 Stat. 1076), and sec. 2 of Public Law 841 (64 Stat. 1041), the defendant corporation is wholly owned by the United States. The Company's third Annual Report for 1954 states (pp. 1-2):

> "The Panama Canal Company is a corporate agency and instrumentality of the Government of the United States of America, which operates under the management of a Board of Directors appointed by the Secretary of the Army in his capacity as stockholder of the Company. The Company is charged with the maintenance and operation of the Panama Canal; the conduct of the business-type operations incident to the canal operation; and the provision of supply, maintenance, administrative, and other support to the civil government of the Canal Zone.
>
> . . . . . .

"The Panama Canal Company is expected (a) to recover all costs of operation and maintenance of its facilities, including depreciation, (b) to pay interest to the Treasury on the net direct investment of the Government in the Company, and (c) to reimburse the Treasury for (1) the annuity payments to the Republic of Panama under the Covention of 1903 as modified by the Treaty of 1936 between the two Governments, and (2) the net costs of operation of the Canal Zone Government including depreciation on fixed assets. The interest rate for the fiscal year 1954, as set by the Secretary of the Treasury, was 2.342 percent. The Board of Directors is required to appraise, at least annually, the Company's working capital requirements, together with reasonable foreseeable requirements for authorized plant replacement and expansion, and to pay into the Treasury as a repayment of capital the [fol. 159] amount of any funds in excess of such requirements. All funds other than working balances are carried with the United States Treasury."

The Government Corporation Control Act (31 U.S.C. sec. 847) requires the Company to submit its annual budget program to the President through the Bureau of the Budget.

From the statement by General Seybold, President of the Panama Canal Company, at Hearings before the Committee on Merchant Marine and Fisheries of the House of Representatives, March 29, 30, and 31, 1955 (pp. 78-79), it appears that the Company carries in commercial banks only about $5 million, "the minimum needed for our day-to-day requirements. The rest is carried with the United States Treasury." If the plaintiffs succeeded in obtaining their money judgment, it would clearly affect the Treasury of the United States.

It is the defendant's contention that the Court lacks jurisdiction because the United States, an indispensable party, has not been joined, and as the suit in effect is against the United States, which has not consented to be sued, the complaint should be dismissed.

The present toll rate for vessels transiting the Panama Canal was fixed by the President of the United States

(Proclamation No. 2247 of August 25, 1937, as amended by Proclamation No. 2249 of August 31, 1937. See 13 F.R. 1623) in 1937, pursuant to specific authorization (37 Stat. 560, c. 390, sec. 5) and the rate so fixed "shall continue in effect until changed" (64 Stat. 1038, sec. 11).

It is the defendant's contention that since the complaint fails to raise any question as to the constitutionality or legality of these laws or orders issued by the President of the United States, the present rates are legal and the Court lacks jurisdiction to enter any judgment for recovery of tolls alleged to be illegal.

[fol. 160] Under sec. 11 of Public Law 841 (64 Stat. 1038), the defendant is authorized to change the tolls, but such proposed changes "shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive." For reasons indicated below, the defendant has not yet submitted any proposed changes to the President of the United States.

According to testimony given at a hearing, December 5, 6 and 7, 1955, before the Panama Canal Sub-Committee of the House of Representatives, Mr. Robert E. Mayer, President of the Pacific American Steamship Association, stated (p. 9 of mimeographed transcript):

> "Our counsel, has advised us 'that if there were a [toll rate] hearing under the present law, the users of the Canal would have no right of appeal from the decision of the Board [of Directors of the Panama Canal Company].

It is the defendant's contention that the Court lacks jurisdiction to issue injunctions designed to control the exercise of discretion by the President of the United States and by the Company.

The annual and other reports issued by the Company, copies of which will be furnished to the Court at the hearing of this motion, show that the Company's principal source of revenue is tolls collected from vessels which transit the Canal, and that since 1937, the rate of tolls fixed by the President of the United States pursuant to authorization from Congress has been 90 cents per laden

vessel ton. General Seybold, President of the Panama Canal Company, at hearings before the Committee on Merchant Marine and Fisheries, House of Representatives, March 29, 30 and 31, 1955, stated (p. 13) that the toll rate has remained constant since 1937 even though freight rates on all routes have increased significantly since then.

[fol. 161] Since 1951, this rate has been continued in effect by Public Law 841 until the Company exercises authority to call a hearing and change the rates, subject to final review and approval by the President.

The reports submitted to the Congress by the Company disclose that the Company has been engaged in a continuing study of the rates of tolls for use of the Panama Canal. In his statement before the Panama Canal Sub-Committee, Committee on Merchant Marine and Fisheries, House of Representatives, June 9, 1954, General John S. Seybold, President of the Panama Canal Company, and Governor of the Canal Zone, said (pp. 19-20):

> "Under date of March 9, 1954, I submitted to the Congress a report of the Company's continuing study of the rates of tolls for use of the Canal. This report stated that as of that date the existing rates were sufficient to cover all operating costs, including interest and depreciation, as required by the tolls statutes. Although since the date of that report, traffic through the Canal has continued to decrease slightly, the decline has not proceeded at as high a rate as had been forecast approximately six months ago. The Company is maintaining current projections of traffic through the Canal and will, of course, take the steps necessary to increase the rate of tolls when if required by the provisions of the statute.

Public Law 841 requires that the Company revalue its assets to ascertain the investment of the United States after analysis of cost, probable earning power, depreciation, obsolescence and shrinkages in value and "insofar as practicable, there shall be excluded from such amount any portion of the value of the transferred property which is properly allocable to national defense." Until this revaluation has been completed no new toll rate can be considered.

[fol. 162] As further appears from the above statement by General Seybold (p. 15):

> "Since the date the reorganization became effective, first priority has been given to a study of the value of properties transferred to the Company as required by the law. A preliminary appraisal and inventory of the properties so transferred has been completed and the firm policies governing the valuation of the properties as well as the rates of depreciation and obsolescence have been developed."

Under Public Law 841, when this revaluation has been completed by the Company, it must be approved by the Bureau of the Budget before new toll rates can be submitted to the President of the United States.

General Seybold in his statement before the Commerce and Related Agencies Sub-Committee of the Committee on Appropriations of the United States Senate in submitting the Company's budget program for fiscal year 1956 said (pp. 9-10):

> "On January 25, 1955, the United States and Republic of Panama signed a new treaty and related memorandum which may have far-reaching effects upon the fiscal operations of the Panama Canal Company. It is too early to determine these effects since the treaty has not yet been ratified by the Senate, and some of the proposals of greatest fiscal consequence will require Congressional action. The new treaty would increase the annuity payable to Panama by $1.5 million, from the present $430,000 to $1,930,000. Subject to legislative directive, extensive real estate holdings in the Republic of Panama would be transferred to Panama without charge. Under the new argeement, when ratified, the Company will discontinue the sale of goods and services to non-citizen employees who do not live in the Canal Zone and will discontinue sales of certain supplies to ships. The new agreements also contemplate the extension of the Civil Service Retirement Act to our non-citizen employees."

[fol. 163] This treaty was ratified by the United States Senate in July 1955, shortly before the adjournment of

the last session of Congress (69 Stat.). The will of Congress remains uncertain as to the extent to which the increased annuity and the increased expenses resulting from the extension of civil service benefits should be borne by the Company. The will of Congress must first be ascertained before any change in toll rates can be considered.

There is the statement by General Seybold before the Committee on Merchant Marine and Fisheries of the House of Representatives on March 29, 30, and 31, 1955 (p. 76) that the Company expects a loss for 1956. He also states (p. 82):

> "* * * We cannot state today the effect of the new treaty upon the Company and its fiscal status. There will be large annual loss to the Company if these charges are placed against the Company, such as the increased annuity, but that is a matter which will have to receive the attention of Congress before it is done. We also will be charged, I am sure, with the extension of civil-service benefits to the noncitizen group. There will be a loss in our income due to sales of ships. And there will necessarily be a fairly large replacement program for employees' quarters, schools, and the like, for the facilities which are now presently in that area in Colon, which will be transferred to the Republic of Panama.
>
> "All of these items will be, of course, determined by the Congress to see what its burden shall be on the Company. It would be very difficult to anticipate just what the final answer will be in that matter. The treaty has been signed but has not been ratified by the Senate as yet. I think the outcome of that and the matter of the legislation that has been discussed here will have an effect on the fiscal status. The amount will be determined when the terms are set and the will of Congress is shown."

[fol. 164] On or about May 16, 1955, the General Accounting Office submitted to the Congress an advisory report (Report on Audit of Panama Canal Company and the Canal Zone Government for the Fiscal Year ended June 30, 1954. House Document No. 160, 84th Congress, 1st Session). A copy of this report will be furnished the

Court at the argument of this motion. Under the Government Corporation Control Act (31 U.S.C. 846) the Company is specifically included as a "wholly owned Government corporation." Under sec. 851 the General Accounting Office is empowered to make such recommendations in connection with its audit report, as it may deem advisable. Under the Accounting and Auditing Act of 1950 (31 U.S.C. 65a) the Company, a Government corporation under the Government Corporation Control Act is not an "executive agency" and is not subject to accounting or other control by the General Accounting Office.

The following statement is contained in said report (pp. 2 and 3):

> "Based on the financial results of the canal activity for the past three years, toll rates would have to be reduced substantially *if* hearings were held at this time." [Emphasis supplied]

In this report the General Accounting Office did not recommend, nor did it have the power to require, that hearings *should* be held at this time. In this report the General Accounting Office did not state, nor did it have authority to state, that shipping companies using the Canal were entitled to recover any monies in connection with tolls which they had previously paid, or that the present tolls are illegal.

[fol. 165] The above audit report states (p. 1):

> "We are unable to state that the accompanying financial statements (exhibits 1-7) present fairly the financial position of the Canal organization at June 30, 1954, or the results of operations for fiscal year 1954," [for various reasons including the fact (page 2)] that the "inventory and appraisal of properties is still incomplete . . . the management expects to complete the inventory and appraisal in 1956. Any adjustments to property or inventory accounts will affect the net investment of the Government, annual interest charges, and the amount of indebetedness to the Treasury at June 30, 1954. Property adjustments will also involve changes of annual depreciation charges."

With reference to the above statements, the report further states (p. 27):

> "The revaluation of assets transferred from the Panama Canal agency on July 1, 1951, was begun in November 1952. The management expects the revaluation to be completed in fiscal year 1956. Therefore, fixed assets, accumulated depreciation and obsolescense, and depreciation for the current year are tentatively stated in the financial statements. Defense facilities and idle plants are fully offset by a valuation allowance."

The report states (p. 28):

> "The amounts of the United States Government's net direct investment in the Company and in the Canal Zone Government are subject to adjustment upon completion of the inventory and appraisal of assets. Appraisal of the assets transferred to the Company from the Panama Canal agency on July 1, 1951, is required by law. The Canal organization is also appraising all other properties so that all property valuations will be stated on a consistent basis."

Exhibit 1 (p. 33) of the report *tentatively* states the investment of the United States in the Panama Canal Company and Canal Zone Government. Exhibit 3 (p. 35) *tentatively* indicates revaluation adjustments to assets transferred from the Panama Canal agency to the Company. Exhibit 4 (p. 37) *tentatively* states the income of the Company.

[fol. 166] Until the value of the assets transferred from the Panama Canal agency to the Company is determined by the Board of Directors and approved by the Director, Bureau of the Budget, no final action can be taken on a new toll rate.

The report (p. 21) refers to a number of particular factors which may materially affect future operating results of the Canal organization. Such effects of future operations may well affect future toll rates, but at the present time the "financial effects of all these changes are unknown, because the management has not had sufficient time to make a complete forecast." (p. 21)

Certain of these factors seem noteworthy in view of their possible effect upon future toll rates.

The treaty with the Republic of Panama, which was ratified by the United States Senate in July 1955, will increase the annuity paid to Panama from $430,000 to $1,930,000, thus increasing the annual cost of operations by $1,500,000. (p. 21)

In consequence of this treaty, the Congress will be requested to enact legislation authorizing the establishment of a single basic wage scale and providing for uniform application of the Civil Service Retirement Act for all American and Panamanian employees of the United States in the Canal Zone. (p. 21) As stated in the report (p. 21) "the extent to which these benefits will affect annual payroll costs cannot be determined until all positions in the Canal organization have been classified." This involves nearly 11,000 non-American employees. "(p. 22)

Proposed salary increases for Federal employees, which have been under consideration of the Congress, would increase the operating costs of all Canal organization activities. (p. 23)

[fol. 167] The complaint herein was filed shortly after the issuance of the above advisory audit report to the Congress by the General Accounting Office. The General Accounting Office did not recommend that a hearing should be held at this time. In the event that a hearing were held by the Company, it still remains uncertain whether a proposed change in toll rates would be approved by the President, whose judgment is final and conclusive in this matter. As appears from the statement by Mr. Robert E. Mayer, quoted on p. 4 of this affidavit, their counsel advised that if there were a hearing under the present law, the users of the Canal would have no right to appeal from the Company's decision.

It affirmatively appears, therefore, that the Company and the General Accounting Office are in agreement that new toll rates cannot be fixed at this time because the process of revaluation of the Company assets has not yet been completed. The Company and the General Accounting Office are likewise in agreement that implementation of the recently ratified treaty with the Republic of Panama might result in an increase in toll rates if, as is likely, the

Company bears the extra costs contemplated by that treaty. As the present toll rates were fixed by the President in accordance with law, the complaint should be dismissed. Until the President approves new rates, nothing can be done, and the action to change the rates is prematurely brought. Since the plaintiffs' claims are actually against the United States, and since the United States has not been made a party, the complaint should be dismissed. [fol. 168] I, therefore, respectfully ask that this motion to dismiss the complaint be granted.

Leavenworth Colby

Sworn to before me this 15th day of December 1955.

Gladys E. McGaffey, Notary Public

[fol. 169] In United States District Court, Southern District of New York

[Title omitted]

Excerpts from Transcript of Hearing Before Judge Walsh— December 20, 1955

Before Hon. Lawrence E. Walsh, District Judge

New York, December 20, 1955
2:15 o'clock p.m.

Appearances:

Maclay, Morgan & Williams, Esqs., Attorneys for Plaintiffs; C. Dickerman Williams, Esq., of Counsel.

Paul W. Williams, Esq., United States Attorney, for the Defendant; Robert Seaver, Esq., Attorney, Department of Justice.

[fol. 170] (Case called.)

Mr. Seaver: Ready for the motion.

The Court: All right.

Mr. Seaver: As your Honor heard this morning, this is an application for the extension of defendant's time to perform certain acts which I will describe a little later.

I notice the plaintiff has seen to it that we are on the record here today.

This is a class action brought by all of the shipping companies, both American and foreign, whose vessels have occasion to transit the Panama Canal, brought against the Panama Canal Company, a government corporation, to recover the sum of approximately $38,000,000, representing allegedly excessive tolls charges for transiting the Canal.

The tolls are alleged to be excessive because the defendant has failed to establish the toll rates in accordance with the criteria established by Congress and the statutes.

The plaintiffs also seek equitable relief in the form of injunctions and mandamus to compel the establishment of these tolls in accordance with their view of the statutes. [fol. 171] They also ask an accounting and declaratory relief.

Essentially, I think it can be said that the plaintiffs ask this Court to establish the rate for the tolls for going through the Panama Canal retroactively to July 1, 1951.

Now the defendant has filed a motion to dismiss the complaint based solely on the lack of jurisdiction of this Court over the subject matter of this action, and the failure of the plaintiffs to join an indispensable party, the United States. This motion will be heard before your Honor the day after tomorrow, on the 22nd.

The present applications which I am arguing now are two: The first of these two is an application for the extension of the time for the defendant to respond to various discovery practices initiated by the plaintiffs, or to move with respect to the discovery matters, which consist of interrogatories, a request for admissions, two depositions to be taken in Washington, that of the Comptroller General of the United States and one of his principal officials in the General Accounting Office; and, incidentally, if our motion is granted here on the basis that we are asking, [fol. 172] it will also alleviate the need of the Government to move to quash subpoenas duces tecum served on the Comptroller General, which motions will be made in the district court by the Government this week unless this extension is granted.

The second application seeks an extension of the time for the defendant to file these affidavits in response to what is in effect a motion for summary judgment filed by the

plaintiffs, and an extension of the hearing of that motion.

We are presently faced with a deadline for filing our responses to these various things, the 22nd, the day after tomorrrow. The hearing of the motion for summary judgment is now set for the 5th of January. We are asking that all of these deadlines be extended up to thirty days after the defendant's motion to dismiss, raising the question of this Court's jurisdiction, is decided.

Now we have made these motions, divided them into two, because it occurred to us that your Honor may possibly prefer that that motion addressed to the motion for summary judgment filed by the plaintiffs, go to Judge Edelstein, who signed the show cause order, which was the means plaintiffs employed to bring up the motion [fol. 173] for summary judgment.

Now, since that was signed, since that time, the parties have agreed upon an extension of the time for doing the things outlined in the show cause order. I personally do not request particularly that it go to Judge Edelstein, and I do not personally feel that it should necessarily go, but I mention that just in case your Honor should prefer that it go there.

Actually, the grounds for both motions are the same, and it is the same case, and I think expediency would dictate that your Honor hear both of them.

Now, our request for extension of time is based on two grounds; first, we simply require more time to assemble and correlate the vast amount of documentary evidence that is called for in these various moves of the plaintiffs, but, more important, I think much more important, is the rule frequently announced by the Supreme Court and other courts, that an issue of jurisdiction should be decided before any other action is taken in a case.

Now we feel very sincerely that there is a grave doubt as to the Court's jurisdiction in this case.

[fol. 174] The Court: What is the lack of jurisdiction based on?

[fol. 175] The Court: Let us see what your opponent has to say. I think I have got your point.

Mr. Williams: Your Honor, my objection to Mr. Seaver's motion is basically this, that what he is making here is not really a motion to dismiss for want of jurisdiction, but,

really, a motion for summary judgment dismissing the complaint.

I say that because the motion is supported by an affidavit of Mr. Colby, which goes way beyond any possible jurisdictional question, and goes directly to the merits of the case, and makes it very clear that what he is making here is a cross-motion to our motion—his cross-motion having been made on December 16th, whereas our motion for summary judgment was made on October 28th.

Now, as Mr. Seaver has described the nature of the suit, and as it is my object to sell the substantial identity of these two motions—that is to say the Government's motion or, rather, Mr. Seaver's motion is basically one [fol. 176] for summary judgment in his favor, whereas our motion is basically one for summary judgment in our favor, I would like to compare the motion papers.

But first let me describe the nature of the case in general. [fol. 177] Now I want to show the substantial identity as to subject matter, at any rate, of our motion and the defendant's motion here.

If your Honor will turn to Mr. Colby's affidavit supporting Mr. Seaver's motion, your Honor will find on page 8, it begins "On or about May 16, 1955"——

The Court: Yes.

Mr. Williams: —"On or about May 16, 1955 the General Accounting Office submitted to Congress a final report," and so forth.

The second sentence is:

> "A copy of this report will be furnished the Court at the argument of this motion."

In other words, the defendant states that for the determi- [fol. 178] nation of its motion it is necessary that the Court have that report before it.

Now if your Honor will turn to our own motion, to Exhibit A—and there are little letters there stating where the various exhibits begin—your Honor will find that Exhibit A is that very report that Mr. Colby refers to as one of the bases for his motion. In other words, his motion is based on the GAO audit report for 1954. Our motion is based on the GAO audit report for 1954.

Now if your Honor will turn to page 4 of Mr. Colby's affidavit supporting the motion to dismiss, your Honor will find in the paragraph, first sentence of the paragraph at the bottom of the page, a sentence beginning:

> "The annual and other repor issued by the company, copies of which will be furnished to the Court at the hearing of this motion, show that the company's principal source of revenues," and so forth.

Now he is there talking about the annual reports issued; I don't know what other reports he means, but I do know what he means by the annual reports, and just as they are the foundation of his motion, they are also the founda- [fol. 179] tion of my motion.

Now if your Honor will turn to Exhibit E, in that set of exhibits attached to my motion your Honor will observe that Exhibit E is the first annual report of the Panama Canal Company.

In other words, that is one of the annual reports on which he is going to rely.

Now if your Honor will turn to Exhibit F, your Honor will observe that that is the second annual report of the Panama Canal Company, another exhibit upon which the defendant relies in support of its motion.

The Court: I do not suppose it is so much a question of he relies on the same documents as it is of what the issue is, that he refers to them for.

Is there anything controversial in this affidavit he submits in support of his motion that the Court lacks jurisdiction?

Mr. Williams: Your Honor, if it were simply based on provisions of law, I would not be making the point I am making now. My point is that we both rely upon the same documents. I say those documents entitle me to relief; Mr. Seaver says those documents entitle him to relief.

[fol. 180] Now may I also say this: These motions to dismiss, which are supported by affidavits, have frequently come before this Court, and both the Court of Appeals and this Court have continually and consistently ruled that when a motion to dismiss is supported by an affidavit, it is the equivalent of a motion for summary judgment in favor of the defendant; and what we basically have

here are two cross-motions for summary judgment, and all I am saying is that they should be heard at the same time.

Now, if at the conclusion of the argument the Court thinks that there is sufficient force in any jurisdictional contention that is made by Mr. Seaver, he did not go into the other arguments; but we began this suit in September. Our motion was made in October. In early November the defendant asked for an extension of time and asked for January 5th for the return date of our motion for summary judgment.

Now, basically, what he is trying to do here is to get his motion for summary judgment——

The Court: We have been all over that, Mr. Williams. What I don't understand is this: Why do we need to make him go ahead and prepare a long set of papers on the merits when I can decide that without any controversy as [fol. 181] to the facts? Is there any controversy between you as to the facts on the jurisdictional point, or is it just a question of law? Or is this just background too——

Mr. Williams: It is more than that.

The Court: That is what I would like to hear about.

Mr. Williams: Would your Honor direct your attention to page 7 of the supporting affidavit on the defendant's motion here?

The Court: Yes.

Mr. Williams: On page 7 he refers to a treaty, which was a treaty with the Republic of Panama.

Now the second sentence on page 7 is:

> "The will of Congress remains uncertain as to the extent to which the increased annuity and increased expenses resulting from the extension of Civil Service benefits should be borne by the company. The will of Congress must first be ascertained before any change in toll rates can be considered."

In other words, he is saying that the prospect of a new law dissolves or constitutes a defense to our contention of action unlawfully withheld and unreasonably delayed. [fol. 182] This talk of the treaty here can only be responsive to our point that action here has been unreasonably delayed and unlawfully withheld.

The Court: How does that bear on the lack of jurisdiction and the other point, which are the only two points he is asking me to pass on?

What you are saying is that he has a lot of prejudicial statements which might prejudice me if I were to come to the summary judgment motion, but if it is all surplusage, what difference does it make?

He raises two points, one, that only the President can review these rates, and, two, that inasmuch as they must ultimately be paid by the United States Treasury, the United States is a necessary party.

Now, are those facts in controversy?

Mr. Williams: Well, there is not any doubt that the law provides that although the defendant here shall prescribe rates in accordance with the formula which I read to your Honor, before the rates actually take effect, the approval of the President must be obtained. In other words, the President has a Veto over these rates.

[fol. 183] But the fact that the President may upset the rates or reverse the rates is not a reason why these people —why the defendant should not go ahead and prescribe the rates. The duty was laid on the defendant five years ago, and the President can't act until something is served up on him.

The Court: He is not suggesting that as a defense on the merits. He is saying that is why I can't even hear the case; that the President is the exclusive person who can review that.

Now whether he is right or wrong on that is another question. Whether the mere fact that the President has to approve what this corporation does means that I do not have an opportunity to review what it does as against the statute, which is quite a different question—but all he says is why go ahead and do all this work on the merits when on that question of law you may not have any right to hear it?

Mr. Williams: Well, will your Honor strike Mr. Colby's affidavit from the record?

The Court: If there is nothing in there on the question of jurisdiction it is harmless; why do we have to go ahead now? Why do I have to pass on that at this moment? [fol. 184] What does that have to do with whether we hear this first or whether we do not, inasmuch as I am very un-

likely to hear this thing on the merits? If I should happen to read Mr. Colby's affidavit, I can strike it if I conclude it is worthless.

Mr. Williams: The point is that in putting in a supporting affidavit based on the same documents on which our motion is based, he is making it possible for your Honor to deny our motion on the ground that the delay, we will say, has been reasonable. In other words, the affidavit is loaded with facts which can only be relevant as to the reasonableness or lack of reasonableness on the delay.

The Court: If you want assurance that I am not going to pass on the merits or the reasonableness of the delay, but only this Court's power to hear the whole question, why, I will give that to you right now. In other words, the only question that is going to be raised on December 22nd is whether this Court can hear the case, to begin with; and the only answer that you can get is either (1) we can't even hear it, or (2) we can hear it; and if we conclude we can hear it, there will be a fresh slate and a fresh start on who is right and who is wrong.

[fol. 185] Mr. Wililams: Well, when you narrow it down that way, your Honor, it is very difficult—frankly, I think the motion, even the jurisdictional point, can best be heard in the light of the background, and if your Honor is going to hear the background, your Honor might as well grant——

The Court: I will tell you, I am honestly not interested in the background except that it is nice to know in a vague sort of way what the lawsuit is about, just so you understand various positions and can get some sense out of them in reality rather than as an abstraction.

I would agree with you as a general proposition that if you could bring all of these proceedings on at once I think there would be some advantage to the Court; but to ask the Government to go ahead and start moving to quash subpoenas, fighting over what facts should be produced and what should not, and they get up sets of papers like these, I do not see much gain.

Mr. Williams: Your Honor, this talk about all these discovery proceedings is just an attempt to obscure the issue. The discovery proceedings came down primarily to this: The general counsel for the defendant company delivered

[fol. 186] an opinion to the company saying in substance that they had to reduce Canal tolls. At least that is the intimation.

This opinion is described in part in that GAO audit report.

Now, the GAO audit report simply tantalizes us. It talks about this opinion, and the only thing we can conclude about what the GAO says about it is that it is an opinion of what the General Counsel of the defendant himself rendered, in our favor, and we thought we would be helpful, and it would be helpful to the Court in hearing the argument of this case, to know what the defendant's own general counsel thought about the case, and, if we can, establish that the defendant has been disregarding the opinion of its own general counsel.

Most of the so-called discovery proceedings represented —they are desperately avoiding any attempt on our part, our effort to get hold of this opinion. Apparently the opinion does say what we think it says, otherwise I can't imagine why it would not be produced.

The Court: Mr. Williams, how are you going to be prejudiced if I hear the other case first?

Mr. Williams: In this way, your Honor. As Mr. Colby or Mr. Seaver have recognized, even the motion to dismiss [fol. 187] for want of jurisdiction can best be heard in the light of the background. The background is the same with his motion or with my motion. If your Honor hears the background, your Honor can just as well grant a decision in our favor as a decision in the Government's favor. The arguments are going to be exactly the same. When I argue against——

The Court: I don't think so. If I started hearing your motion, then I have got to go into the reasonableness of these rates; but if I hear his motion, I don't care about reasonableness. I am going to decide if we are even going to go into the reasonableness.

Mr. Williams: Your Honor, here a duty was laid on the defendant five years ago. They issued obscure financial statements. Finally, the General Accounting Office came out and showed what they had failed to do, that they disregarded their duty.

All the documents on this from their point of view or our point of view are the same. They are official publications of the United States Government. They are not anything we say. We are taking their story, and that was given, your Honor——

The Court: Whether their statements are obscure—how [fol. 188] does that give me jurisdiction one way or the other?

Mr. Williams: Well, in deciding the question of jurisdiction—in others words, the two motions are cross-motions and should be heard together. To hear their motion you have to hear the same facts.

I will make the same argument in answer to Mr. Seaver's motion that I make in support of my own motion. The arguments are exactly the same, and they should be combined, or, at least, they should be heard together; and simply a piecemeal determination of the case is simply going to take a lot more time, and five years have elapsed already. We are charging them with unlawfully withholding action and unreasonable delaying action. This is simply an effort to continue that unlawfully withholding and unreasonable delay.

What I object to is a delay in this case on top of a further five-year delay.

We started the case in September. We served our papers in October. In early November they asked for an adjournment and we gave them the adjournment. Now, at the very last minute, in an effort to get across a further stall, they come in with this maneuver by which they think [fol. 189] they can put up an argument, a legal point that will stall the whole thing alone for a little more. Congress supposedly gave us rights, and the legislative history on that is abundantly clear. They gave us those rights in 1950, and here we are in 1955 not getting them today.

What I would like is to have your Honor or whoever is going to hear the motion, have all the facts before them, and the necessity to have all the facts before it to decide the Government's own motion is established by the fact that the Government's own motion is supported by an affidavit which recites the same facts as we recite.

Now we are coming into a court of equity. The Administrative Procedure Act says a citizen can get action against

a government agency for unlawfully withholding and unreasonably delaying.

Here we have been holding off for five years.

The Court: I have got that picture, Mr. Williams.

Mr. Williams: I submit we are in a court of equity——

The Court: I get your point.

Let me hear Mr. Seaver for a second.

Mr. Seaver, what is the point in the two arguments? Is [fol. 190] there a great deal of work you would have to do now to prepare papers——

Mr. Seaver: There is a monumental job ahead of us as lawyers for the defendant here to assemble this vast amount of material that comes from the Canal Zone, the General Accounting Office, and the Bureau of the Budget, and other agencies.

The Court: Now I am going to grant your motion to defer hearing on the merits until we pass on this jurisdictional point.

Now we will come to the question of whether the 22nd is convenient or whether it is not.

Mr. Seaver: I might say this, your Honor: Yesterday or the day before, when I talked to Mr. Williams about the time, he asked that the hearing on the motion to be dismissed be adjourned for two weeks. Now I would not have any objection in the light of your Honor's——

The Court: Well, I assume that you are ready, and, Mr. Williams, you are the one who is complaining about the delay, so when do you want to go into this jurisdictional point?

Mr. Williams: Of course this motion to dismiss was served on me at 4:59 p.m. Friday——

The Court: Well, you got a good long start on this [fol. 191] thing.

Mr. Williams: When they asked for an adjournment of our motion for summary judgment which had been set for December 6th, they asked for an adjournment until January 5th, and I assumed that the whole case would be heard on January 5th.

And, your Honor, I feel, suppose in hearing the argument on January 5th on their motion the judge has heard everything and is prepared to grant us relief, it seems to me that what your Honor is doing here——

The Court: I do not see how he can be prepared to grant you relief unfil he knows they have exhausted their proof. Now, I do not want to get back into that question.

Tell me, just when do you want to have this motion? You can have your choice of any day, any motion day, including today.

Mr. Williams: Of course we are getting into the Christmas season, and I could not be ready by December 22nd, which is the day after tomorrow. I will try to be ready by December 28th.

The Court: It would be the 29th or the 27th of December.

[fol. 192] Mr. Williams: The 29th, then.

The Court: It would help me a great deal, and I do not want to add to your burdens, but if you can exchange your briefs and give them to me ahead of time I will appreciate it.

I think this is not going to be too easy a question of law.

Mr. Williams: Your Honor, to talk about the fact that you can't sue because the Government is involved, Congress has expressly said the defendant can be sued.

The Court: The only thing I have in mind now is whether you can give me your brief by Tuesday.

Mr. Seaver: Your Honor, the defendant will have its brief to you at that time.

Mr. Williams: To tell you the truth, I have been working on a brief; I will try to get it to your Honor by Tuesday.

Does your Honor always want briefs a couple of days in advance?

The Court: It helps me because it gives me a chance to read them before. If you can't make it, it is all right with me.

Mr. Williams: Well, your Honor has gotten into the [fol. 193] case, and your Honor has gotten some familiarity with it, and we might as well.

However, I might say that my answering affidavit to Mr. Colby's affidavit will be the same things that are there.

The Court: All right. I have got the affidavits to work with already. Then, if you get the brief in by Tuesday or, at the latest, Wednesday — I would like to have it Tuesday, but if you can make it by Wednesday, that is better than none at all.

Now we will go ahead and I will hear what some of these others have to say.

Mr. Williams: Now, your Honor, I understand you are simply going to hold these discovery proceedings in suspense until the argument on the 29th, is that right?

The Court: What period of time is reasonable after my determination?

Mr. Seaver: Our motions ask that all of these deadlines be adjourned for a period of thirty days after the decision on the question of jurisdiction.

Mr. Williams: I think your Honor is going to find that that is an unnecessary motion, and I would suggest that your Honor just stay things until the 29th, and then reserve [fol. 194] decision. At that time the argument will familiarize your Honor with the case somewhat more.

The Court: I will stay things to the 29th, and I won't leave either of you in a hole at that time.

Motion granted as indicated on the argument, and the parties can serve orders, settling orders on notice.

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 195] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER EXTENDING TIME TO FILE AFFIDAVITS IN ANSWER TO MOTION FOR SUMMARY JUDGMENT TO DECEMBER 23, 1955

The defendant having moved this Court for an order modifying the order dated October 28, 1955 signed by Honorable David N. Edelstein, by directing that (1) in the event of the denial of the defendant's pending motion to dismiss the complaint herein, defendant shall serve its answering affidavits herein on plaintiffs' attorneys within thirty days after the denial of said motion to dismiss the

complaint, and (2) fixing the return date of the hearing under the said order to show cause dated October 28, 1955 for ten days after the service of such answering affidavits, and said motion having duly come on to be heard before this Court on the 20th day of December 1955,

Now on reading defendant's order to show cause dated December 19, 1955 with due proof of service thereof on the attorneys for the plaintiffs, the affidavits of E. Robert Seaver sworn to December 19, 1955, the complaint herein and the order to show cause dated October 28, 1955 signed by Honorable David N. Edelstein, and after hearing Warren E. Burger, Assistant Attorney General of the United States, and E. Robert Seaver, Attorney, Department of Justice, attorneys for the defendant, in support of said motion, and Maclay, Morgan & Williams, Esqs., attorneys for the plaintiffs (C. Dickerman Williams, Esq., of counsel), in opposition thereto, and due deliberation having [fol. 196] been had by the Court, it is

On motion of Warren E. Burger, Assistant Attorney General of the United States, attorney for the defendant herein,

Ordered that the time within which the defendant may serve and file affidavits in answer to plaintiffs' pending motion for summary judgment returnable on January 5, 1956, be and the same hereby is extended to and including December 29, 1955, until after the argument before this Court of defendant's pending motion to dismiss the complaint herein, and it is

Further Ordered that such disposition as the Court may deem appropriate with respect to any further extension of the defendant's time to serve such answering affidavits and adjourning the date for the hearing of plaintiffs' pending motion for summary judgment, shall be made on December 29, 1955, after the conclusion of argument before this Court of defendant's pending motion to dismiss the complaint herein.

Dated: New York, N.Y., December 23rd, 1955

Lawrence E. Walsh, United States District Judge

[fol. 197] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER RE: TAKING OF FURTHER DEPOSITIONS, ETC.—December 23, 1955

The defendant having moved this Court for an order (1) adjourning the date set for the taking of the deposition of Comptroller General Joseph Campbell of the United States until thirty days after the decision of this Court on defendant's pending motion to dismiss the complaint with the reservation to the defendant of the right to make any motion with respect to said notice and the subpoena issued in connection therewith, (2) adjourning the date set for the taking of the deposition of William Newman until thirty days after the decision of this Court on defendant's pending motion to dismiss the complaint with the reservation to the defendant of the right to make any motion with respect to said notice and the subpoena issued in connection therewith, (3) extending the time of the defendant to answer, except or make any motion with respect to the interrogatories propounded by the plaintiffs to the defendant for the same period, and (4) extending the time for the defendant to answer plaintiff's request for admissions or make any motion with respect to said request for the same period, and said motion having duly come on to be heard before this Court on the 20th day of December 1955,

Now on reading defendant's order to show cause dated December 19, 1955 with due proof of service thereof on [fol. 198] the attorneys for the plaintiffs, the affidavits of E. Robert Seaver sworn to December 19, 1955, the complaint herein, the order to show cause dated October 28, 1955 signed by Honorable David N. Edelstein, plaintiffs' interrogatories addressed to the defendant, pliantiffs' request for admissions addressed to the defendant, the notice to take the deposition of Comptroller General Joseph Campbell and the subpoena issued in connection therewith, and the notice to take the deposition of William Newman together with subpoena issued in connection therewith, and after hearing Warren E. Burger, Assistant Attorney Gen-

eral of the United States, and E. Robert Seaver, Attorney, Department of Justice, attorneys for the defendant, in support of said motion, and Maclay, Morgan & Williams, Esqs., attorneys for the plaintiffs (C. Dickerman Williams, Esq., of counsel), in opposition thereto, and due deliberation having been had by the Court, it is

On motion of Warren E. Burger, Assistant Attorney General of the United States, attorney for the defendant herein,

Ordered that the defendant's motion be and the same hereby is granted to the extent that (1) the taking of the deposition of Joseph Campbell, Comptroller General of the United States, with the reservation to the defendant of the right to make any motion with respect to said notice and the subpoena issued in connection therewith, and (2) the taking of the deposition of William Newman, with the reservation to the defendant of the right to make any motion with respect to notice therefor and the subpoena issued in connection therewith, be and the same hereby are adjourned to and including December 29, 1955 until after the argument before this Court of defendant's pending [fol. 199] motion to dismiss the complaint herein, and (3) the time of the defendant to answer, except or make any motion with respect to the interrogatories propounded by plaintiffs to the defendant, and (4) the time of the defendant to answer plaintiffs' request for admissions or make any motion with respect to said request, be and the same hereby is extended to and including December 29, 1955 until after the argument before this Court of defendant's motion to dismiss the complaint herein, and it is

Further Ordered that such disposition as the Court may deem appropriate with respect to any further adjournments and extensions shall be made after the conclusion of argument on December 29, 1955 of the pending motion to dismiss the complaint herein.

Dated: New York, N. Y.
December 23rd, 1955

Lawrence E. Walsh, United States District Judge.

[fol. 200] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Excerpts from Hearings Before Judge Walsh—December 29, 1955

New York, December 29, 1955,
2:45 o'clock p.m.

* * * * * * *

[fol. 201] Mr. Seaver: I do not believe we will file any unless, of course, there was something in his brief which requires it.

Your Honor, there is one remaining item of business, and that is the further extension of the time within which the depositions are to be taken, and all these things that were stayed until today.

Mr. Williams: Well now, your Honor, I might say that we have filed a request for admissions. In that request for admissions, most of them, namely, Nos. 1 and 7 through 12 inclusive involve official publications of the United States of the same kind that Mr. Colby put in his affidavit. For instance, these budget programs. Here I have simply [fol. 202] photostatic copies of official publications which are admissible as such, and just as Mr. Colby stuck in a lot of things of that kind into his affidavit I would ask that these proposed admissions, which I say are photostatic copies of official publications, be regarded as admissions. They are somewhat remote, but your Honor might find them useful.

The Court: I think Mr. Seaver is talking about—you are not talking about matters for this motion; you want to tender something further on this motion?

Mr. Williams: Your Honor, this is already before the Court. It is in the court file. It is called requests for admissions, and I refer to some of these admissions in a couple of places.

The Court: Now, is there any objection to continuing the stay of the proceedings in the case until I decide this motion?

Mr. Williams: I would not object to continuing the stay. I object to this 30-day request. I see no reason why they should be given any additional time more than that allowed by the Rules of Civil Procedure.

[fol. 203] Mr. Seaver: We will not request that. I think when this motion is decided there will be no occasion to continue this.

The Court: All right, I will continue the stay until the disposition of the motion.

Mr. Seaver: May we supply an order setting out this further extension of the time?

The Court: Yes.

Mr. Seaver: Thank you, your Honor.

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 204] [File endorsement omitted]

[Title omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

ORDER RE: TAKING FURTHER DEPOSITIONS, ETC.—January 4, 1956

The defendant having moved to dismiss the complaint herein, and an order having been made and entered herein on December 22, 1955 extending the time of the defendant to serve and file affidavits in answer to plaintiffs' pending motion for summary judgment returnable on January 5, 1956, to December 29, 1955, after argument on defendant's motion to dismiss the complaint; and an order having been made and entered herein on December 22, 1955, adjourning the date set for the taking of the deposition of Comptroller General Joseph Campbell to December 29, 1955, with the reservation to the defendant of the right to make any motion with respect to the notice and subpoena issued in connection with the notice, and adjourning the date set for the taking of the deposition of William Newman to December 29, 1955, with the reservation to the defendant of the right to make any motion with respect to the notice therefor and the subpoena issued in connection therewith, and extending to December 29, 1955 the time of the defend-

ant to answer, except or make any motion with respect to the interrogatories propounded by the plaintiffs to the defendant, and extending to December 29, 1955 the time of [fol. 205] the defendant to answer plaintiffs' request for admissions or make any motion with respect to said request; and defendant's motion to dismiss the complaint having been heard by this Court on December 29, 1955, and the Court having reserved decision on said motion, it is,

On motion of Warren E. Burger, Assistant Attorney General of the United States, attorney for the defendant herein,

Ordered that the adjournments, extensions and reservations provided for in the orders entered herein on December 22, 1955 be and the same hereby are further extended to and including the date of the determination by the Court of the defendant's pending motion to dismiss the complaint; and it is

Further Ordered that in the event of the denial of defendant's motion to dismiss the complaint herein, such provisions as the Court may deem appropriate with respect to any further adjournments and extensions shall be made by the Court.

Dated, New York, N.Y. January 4th, 1956.

Lawrence E. Walsh, United States District Judge.

[fol. 206] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

GRACE LINE, INC., et al., Plaintiffs,

against

PANAMA CANAL COMPANY, Defendant

OPINION—June 28, 1956

APPEARANCES:

Maclay, Morgan & Williams, Esqs., Attorneys for Plaintiffs, 76 Beaver Street, New York 5, N. Y.

C. Dickerman Williams, Bernard Schwartz, J. Stewart Harrison, William I. Stoddard, Esqs., Of Counsel

Brobeck, Phleger & Harrison, Esqs., Associate Counsel, 111 Sutter Street, San Francisco 4, Calif.

Warren E. Burger, Esq., Assistant Attorney General, Attorney for Defendant, United States Courthouse, Foley Square, New York 7, N. Y.

Leavenworth Colby, Esq., Chief Admiralty and Shipping Section, Department of Justice; E. Robert Seaver, Esq., Attorney in Charge, N. Y. Office, Admiralty and Shipping Section, Department of Justice; Benjamin H. Berman, Esq., and George Jaffin, Esq., Attorneys, Department of Justice, Of Counsel.

WALSH, *D. J.*:

[fol. 207] This is an action by a group of steamship lines to compel defendant to prescribe new tolls for the Panama Canal and for damages based upon its collection of allegedly excessive tolls. Defendant moves to dismiss the complaint, claiming that the court has no jurisdiction over the subject matter because (1) the prescription of new tolls is discretionary; (2) plaintiffs have no standing to sue; and (3) defendant's action is subject to the approval of the President.

The statute in question is Sections 411 and 412 of the Canal Zone Code [1] which reads:

> "411. Authority to Prescribe Measurement Rules and Tolls.——
>
> The Panama Canal Company is authorized to prescribe and from time to time change (1) the rules for the measurement of vessels for the Panama Canal, and (2), subject to the provisions of the section next following, the tolls that shall be levied for the use of the Panama Canal: *Provided, however,* that the rules of measurement, and the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section: *Provided further,* that the said corporation shall give six months' notice, by publication in the Federal Register, of any and all proposed changes in basic rules

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[1] Act of September 26, 1950, C. 1049, 64 Stat. 1038, 1042, which amended 48 Stat. 1122 (1934).

of measurement and of any and all proposed changes in rates of tolls, during which period a public hearing shall be conducted: *And provided further*, That changes in basic rules of measurement and changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive."

[fol. 208] "412. Bases of Tolls.——* * *

"(b) Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including interest and depreciation, and an appropriate share of the net costs of operation of the agency known as the Canal Zone Government. * * *".

It is incidental to the authorization for the transfer of the Canal to the defendant by the President and took effect upon the execution of that transfer on July 1, 1951.[2] Until then the Canal had been administered as an independent agency, under the Secretary of War and the Secretary of the Army.

Defendant is a government corporation, reorganized in 1948 to conform with the Government Corporation Control Act.[3] Its predecessor, the Panama Railroad Company, had been a New York corporation, organized in 1849 for the purpose of constructing a railroad across the Isthmus. The United States had acquired all of its stock from the French stockholders who had previously attempted to dig the Canal. Until 1950, defendant operated facilities incidental to the Canal, such as a railroad, steamship line, dry docks and hotels, but it did not operate the Canal itself.

[fol. 209] The United States, as owner of the defendant, is represented by the President or such other officer of the United States as he may designate. The President or the designated officer is known as the stockholder. The Board of Directors is appointed by and holds office at his pleasure,

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[2] Exec. Order No. 10263, 16 Fed. Reg. 6333 (1951).

[3] 31 U.S.C.A. § 869(b). The Act reincorporating defendant is Act of June 29, 1948, C. 706, 62 Stat. 1075.

except that the Governor of the Panama Canal[4] Code must be a director and president of the corporation.[5]

The transfer of the Canal was in furtherance of a plan to make the commercial facilities of the Canal self-supporting.[6] It was authorized upon a recommendation of the Bureau of the Budget to separate the facilities for the service of commerce from those required for national defense and the police functions of the Canal Zone Government, and to get the former under the business like accounting and budget control which a government corporation is permitted to use rather than those required of government departments.[7] It was precipitated by the belief that an increase [fol. 210] in Canal tolls was necessary, and one had actually been proclaimed by the President although it was deferred pending consideration of the legislation.[8] It was hoped that the statute would establish a permanent tolls policy which would permit periodic adjustment of tolls, to keep the commercial facilities of the Canal self-supporting and make it most useful to commerce.[9]

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[4] The President is authorized to govern the Canal Zone or cause it to be governed by a Governor whom he appoints by and with the advice and consent of the Senate for a four year term. Canal Zone Code §§ 5, 6.

[5] 62 Stat 1077 (1948).

[6] Bureau of the Budget Report, H. Misc. Doc. 460, 81st Cong., 2d Sess., 13-16 (1950); S. Rep. No. 2531, 81st Cong., 2d Sess. 4 (1950).

[7] Ibid.

[8] Proclamation No. 2775 (1948). The effective date was deferred by Proclamation Nos. 2808 (1948), 2831, 2852 (1949), 2875 (1950), and the original Proclamation was revoked by Proclamation No. 2903 (1950) when the new statute was enacted. Prior to the 1950 amendment, the President had power to change the rate of tolls between fixed limits at any time upon six months' notice. Canal Zone Code of 1934 § 411.

[9] The House Report speaks of a "definite and permanent Panama Canal tolls policy" and the need for legislation "establishing tolls policy". H. Rep. 2935, 81st Cong., 2d

[fol. 211] There is no question but that new tolls, if they are prescribed, must conform with Section 412. The first question is whether the statute which "authorized" the fixing of flexible toll rates in accordance with this section, mandated a change to toll rates so computed, or whether it left to the discretion of the defendant, the continuation of the prevailing rates for an indefinite period of time. Plaintiffs claim that Section 411 mandates the prescription of new tolls in accordance with the formula contained in Section 412; that plaintiffs, as users of the Canal, have a right to transit at these prescribed tolls, that execution of the formula of Section 412 would result in a reduction in toll rates; and that the continuation of the previous tolls constitutes an unlawful exaction for the exercise of this right. It is assumed for the purpose of this motion that tolls prescribed pursuant to Section 412 would be lower than those now prevailing, but defendant contends that under such circumstances it was left with the discretion to keep the prevailing toll rates in effect.

It is my conclusion that the statute did not compel prescription of tolls under the statutory formula as long as defendant was content with the then prevailing tolls. It

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Sess., 4, 6 (1950). The Report of the Bureau of the Budget states:

> "While the tolls rate should not be changed on a year-to-year basis since 1 year's experience is insufficient to reflect accurately long-range trends, the rate should be adjusted periodically as changes take place in the factors that determine the charges that should be made for the use of the Canal. As the 1937 special committee expressed it:
>
> > 'Economic and commercial conditions are not static. The Panama Canal is a facility for the service of interoceanic commerce. The charges for the service should receive such adjustments from time to time as will keep the charges in harmony with the needs of the Canal and the requirements that must be met in making the Canal the servant and assistant of international intercourse.' ".
>
> (H. Misc. Doc. No. 460, 81st Cong., 2d Sess., 16, 1950)).

fixed no time within which the new tolls were required to be prescribed. It expressly provides for the continuation [fol. 212] of the prevailing tolls until changed by the defendant. Its language giving power to prescribe new tolls under the statute is permissive in form; it "authorizes" the prescription of new tolls.[10] When the present provision is read against the pre-existing one, it is apparent that the language "is authorized to prescribe and from time to time change" is identical with the language formerly authorizing the fixing of tolls by the President, whose power was indisputably discretionary.[11] The discriminating use of the permissive form in Section 411 and the mandatory form "shall" in Section 412 manifests an intent to make this language permissive.[12] In addition, [fol. 213] grammatically, the phrase subjecting tolls to the statutory formula, "subject to the provisions of the section next following," modifies the words "prescribe" and "change" not "authorize". Consequently, it is a limit on

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[10] See *United States ex rel McLennan* v. *Wilbur*, 283 U. S. 414, 418, 420:

> "* * * The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable." (p. 420).

See also *United States ex rel Simons* v. *Hines*, C.A.D.C., 69 F. 2d 229; Cf. *Red Canyon Sheep Co.* v. *Ickes*, C.A.D.C., 98 F. 2d 308, 313-314.

[11] The former language of Section 411 provided:

> "The President is authorized, subject to the provisions of the section next following, to prescribe and from time to time change the tolls that shall be levied by the Government of the United States for the use of the Panama Canal, but no tolls when prescribed as above shall be changed unless six months' notice thereof is given by the President by proclamation." (Canal Zone Code of 1934, §411).

[12] *United States ex rel McLennan* v. *Wilbur*, 283 U.S. 414; *United States ex rel Zapp* v. *District Director of Immigration*, 2 Cir., 120 F. 2d 762, 764-5.

the extent of change not the decision whether to change or not. The essential language is as follows:

> "The Panama Canal Company is authorized to prescribe and from time to time change * * *, subject to the provisions of the section next following, the tolls that shall be levied for the use of the Panama Canal. * * * ".

In amending the section Congress did not leave that phrase in its original position immediately following the word "authorize" but moved it away from that word to a position after the words "prescribe" and "change".[13] Such a transposition was quite evidently a precaution against the very ambiguity which plaintiffs are now trying [fol. 214] to read into the statute.[14]

The legislative history is consistent with this construction of the statute's language. Congress in all probability expected that the new formula would be resorted to as soon as defendant could conveniently make the required studies and computations because it had been informed that the new formula would produce more revenue than the prevailing toll rates. Congress did not, however, suggest or consider *compelling* defendant to depart from the then prevailing tolls. It assumed defendant would do so voluntarily. The expectation that tolls would be increased

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[13] The section formerly read:

> "The President is authorized, subject to the provisions of the section next following, to prescribe and from time to time change * * * ".

[14] The change in the modifying position of the "subject to" clause was not necessary to enable Congress to subject tolls to section 412 without subjecting rules for the measurement of vessels. By an easy rearrangement of the words of the former provision it could have provided:

> "The * * * Company is authorized to prescribe and from time to time change the rules for the measurement of vessels, and, subject to the provisions of the section next following, it is authorized to prescribe and from time to time change the tolls. * * * ".

[fol. 215] is spread through the reports of the Congressional Committees and their hearings.[15] The estimate submitted to Congress by the Bureau of the Budget was that a five cent per ton increase would be required by the statutory formula,[16] and Congressional discussions centered primarily on proposed restrictions to prevent it from going substantially higher.[17]

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[15] See for example Statements of Former Senator Joseph Ball, representing the Association of American Ship Owners; Colloquy during Statement of Gregory Prince, representing the Association of American Railroads; Hearings before the Subcommittee on the Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives on H. R. 8677, 81st Cong., 2d Sess., 80, 141 (1950); Statement of Harold Seidman, accompanied by Russell Roane, representing the Bureau of the Budget; Colloquy during statement of Joseph Ball, Vice President, Association of American Ship Owners; Hearing before a Subcommittee on the Committee on Armed Services, United States Senate on H. R. 8677, 81st Cong., 2d Sess., 8, 17-18 (1950).

[16] The report of the Senate Committee on Armed Services states that:

> "* * * The committee inquired into the effect of this legislation on the existing tolls which are now set at 90 cents a vessel-ton, as well as the amount of interest that would be paid into the Treasury under the new bill. * * *.
>
> "Testimony of the representatives of the Bureau of the Budget indicated that under prevailing conditions the application of the provisions of this bill, as amended, would probably result in a tolls rate of about 95 cents per net vessel-ton. This is derived from the following data: * * *".
>
> [S. Rep. No. 2531, 81st Cong., 2d Sess. 5 (1950)].

[17] The principal controversies concerned a proposal for a $1 maximum limit which was defeated, [Hearing before a Subcommittee of the Committee on Armed Services, United States Senate on H. R. 8677, 81st Cong., 2d Sess., 5, 9, 10, 16, 27-28 (1950); Hearings before the Subcommittee on

[fol. 216] Although on one occasion a spokesman of the Bureau of the Budget spoke of the bill as providing that the Company "shall prescribe" toll rates in accordance with the statutory formula,[18] equally important statements

In several instances persons appearing before the Senate Committee referred to the new tolls as being "required". In each instance the witness was describing the effect of Section 412 not 411. He was stating, in substance, that Section 412 "required" prescription of tolls at a particular rate. [Hearings before a Subcommittee of the Committee on Armed Services, United States Senate on H. R. 8677, 81st Cong., 2d Sess., 8, 10, 12, 26 (1950)]. There is no question that if tolls are to be prescribed they are required to conform to section 412. The question is whether section 411 requires that they be prescribed.

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the Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives on H. R. 8677, 81st Cong., 2d Sess., 80 (1950)] and the proposal to eliminate interest during construction from the capital cost of the Canal which was accepted and which it was believed would result in only a five cent per ton increase instead of fifteen cents per ton. [Hearings before the Subcommittee on the Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives on H. R. 8677, 81st Cong., 2d Sess., 51, 52-3, 56, 78 (1950); Hearing before a Subcommittee of the Committee on Armed Services, United States Senate on H. R. 8677, 81st Cong., 2d Sess., 8 (1950)].

[18] Statement of Harold Seidman before a Subcommittee of the Committee on Armed Services, United States Senate, op. cit. 7:

> "H. R. 8677 provides that the Panama Canal Company shall prescribe the toll rates in accordance with a formula established in section 14 of the bill, subject to the President's approval. The Company, as under present law, would be required to give 6 months' prior [fol. 217] notice of any proposed changes in rates, and, in addition, to conduct a public hearing on the proposed changes."

regarding the language of Section 411 speak of it in a permissive sense.[18a] The principal spokesman for the steamship lines described it as a transfer of the President's [fol. 218] authority rather than a contraction of it.[19] Fur-

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[18a] Statement of Hon. Francis R. Newcomer, Governor of the Canal Zone, and President of the Panama Railway Co., Hearings before the Subcommittee on the Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives on H. R. 8677, 81st Cong., 2d Sess., 30 (1950):

> "14. Sections 24 and 25 of the bill would amend the existing tolls sections (secs. 411 and 412, respectively, of title 2, Canal Zone Code) in such manner as to vest in the corporation the authority to fix measurement rules and tolls, and to prescribe the bases of tolls. * * *".

The Report of the House Committee on Merchant Marine and Fisheries stated:

> "The Directors of the Company will be authorized, by this bill, to establish toll rates subject to the President's approval. Such rates will be finally set only after notice and public hearing. * * *".
> [H. Rep. No. 2935, 81st Cong., 2d Sess., 3 (1950)].

[19] Statement of Former Senator Joseph Ball, representing the Association of American Ship Owners, Hearings before the Subcommittee on the Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives on H. R. 8677, 81st Cong., 2d Sess. 76 (1950):

> "We have no objection to section 24, which transfers the authority to fix tolls and basic rules of measurement to the Panama Canal Company, subject to final approval by the President. The transfer of authority retains the present provision in the law requiring six months' notice, by publication in the Federal Register, of any proposed change in toll rates or measurement rules."

The President had complete discretion as to when to change tolls under the former statute.

ther, although the House Report speaks of the statute as "establishing tolls policy",[20] there was express recognition in the hearings and in the debate that defendant might delay the imposition of new tolls and that Congress could control such action or non-action upon review of its budget.[20a]

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[20] H. Rep. 2935, 81st Cong., 2d Sess. 4, 6 (1950).

[20a] Statement of Harold Seidman, Bureau of the Budget, House Hearings on H. R. 8677, at pp. 49-50:

"Mr. Shelly. On page 5 in the last sentence of the second paragraph you say:

'The Congress will, of course, have an opportunity to examine the tolls policy in connection with its review of the business type budget to be submitted annually by the company.'

"Can you elucidate on that a little more; it is more of a possible review of it?

[fol. 219] "Mr. Seidman. No; it is a going review. That, we believe, is one of the advantages of the new arrangement—that the Panama Canal Company will come in with a business type budget which is more informative and will pertain to a business operation more than the present budget. It is not merely a question of a request for appropriations; or how much they spent last year. It is an excellent statement of financial condition—income and expense, capital expenditures, as distinguished from operating expenses, and so forth.

"Congress, in going over that, would be able to determine—are the rates high enough to cover the cost of operation? That would be indicated in the budget statement which would be practically a balance sheet, or, on the other hand, you might say, 'Your revenues are far exceeding your cost of operation and you should consider changing your policy with respect to rates.'

"Also, of course, the Congress may act upon how much should be paid in dividends by the corporation.

"Mr. Shelly. It is in the review by Congress we are to determine the budget submitted, which will be in advance of the levying of the tolls.

"Mr. Seidman. That is right. You would not change

[fol. 220] It is also noteworthy that Congress permitted a bill to die which would have expressly required the Governor of the Canal to report proposed rates under a similar new formula within sixty days,[21] and that it failed to act upon the request of a representative of the steamship lines that a Congressional Committee be designated a

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the rates from year to year in any event. I think over a period of years, seeing what the income statement was and the expense statement, you could determine from that whether the tolls were too high or too low, or what the reasons were for the toll policy. *There may be many reasons why the Congress might have the Canal operate at a loss for a certain period, or at a profit, depending upon the circumstances.*" (Emphasis supplied).

Statement in debate by Representative O'Toole, 96 Cong. Rec. 13372 (1950):

"* * * The bill, if enacted, will permit a board of directors to know the sources and amounts of revenue in the Canal enterprise. It will, under well-established corporate control methods, give the Congress a thorough and complete accounting for these business functions on an annual basis, and will present annually to the Congress a budget reflecting all the revenues and expenses of these many business enterprises. While the Board of Directors of the proposed Panama Canal Company will have normal powers, matters of policy will be controlled by the Congress through the annual budget submitted to the Congress under the Government Corporation Control Act of 1945".

[21] S. 3650, 81st Cong., 2d Sess., Senator Magnuson; the last bill section reads:

"Sec. 2. The Governor of the Canal shall report to the President and to the Congress not later than sixty days after the date of enactment of this Act a schedule of proposed toll rates, computed in compliance with the amendment made by this Act, including the detailed factors used in determining such rates."

"watchdog" to receive at regular intervals suggestions by [fol. 221] the steamship industry as to the execution of the Act.[22]

At the heart of any consideration of the nature of the duty imposed upon the defendant, as well as the other questions raised by this motion, is the power entrusted by Congress to the President with respect to the Canal in general and its tolls in particular. Section 411, itself, gives the President unrestricted power to block any change in tolls. And his unrestricted control over the appointment and removal of defendant's directors, gave him full power to compel them to perform any duty with respect to the prescription of toll rates to which the statute might subject them.[23] No objection was expressed to the

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[22] Statement of Frazer A. Bailey, President of the National Federation of American Shipping, Inc., Hearings before the Subcommittee on the Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives, on H. R. 8677, 81st Cong., 2d Sess., 61-62 (1950):

> "Following the precedent in the case of the administration of the ECA Act, we suggest that this Committee constitute itself into a 'watchdog committee', that the Canal authorities be required to submit reports at regular intervals, and that the industry be permitted to present its suggestions in the interest of effectively carrying out the provisions on H. R. 8677 and of congressional intent."

[23] The only restriction upon the President's selection of the defendant's stockholder is that he be a public officer. The designation is at the pleasure of the President in the absence of any provision to the contrary. *Myers* v. *U. S.*, 272 U. S. 52, 161; *Bailey* v. *Richardson*, C.A.D.C., 182 F. 2d 46, 58, aff'd. 341 U. S. 918; *Board of Directors of City Trusts* v. *Maloney*, C.A.D.C., 141 F. 2d 275, cert. den. 323 U. S. 714.

The appointment of members of defendant's board is not subject to the advice and consent of the Senate. Members serve at the pleasure of the stockholder.

[fol. 222] continuation of his control.[24] Indeed, it was pointed to as one of the bill's two important safeguards, the other being Congressional control of the defendant's [fol. 223] budget.[25] The interposition of the defendant in the toll making procedure was as an aid to the President not as a restriction upon him. It was to delegate the "almost ministerial" aspects of this work to an agency with an adequate staff for this work.[26]

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[24] The President was not even mandated to transfer the Canal to defendant; under the statute he could have continued to operate the Canal as an independent agency with his old power with respect to tolls. 64 Stat. 1042 (1950).

[25] Statement of Harold Seidman, Bureau of the Budget, Hearings before a Subcommittee of the Committee on Armed Services, United States Senate on H. R. 8677, 81st Cong., 2d Sess., 7 (1950):

> "There are two important safeguards provided in the bill. The first is the requirement for a public hearing and the second for Presidential approval. Since tolls may have an effect on national transportation policy, review and approval of the rate by the President is believed essential. The Congress will, of course, have an opportunity to examine tolls policy in connection with its review of the business-type budget to be submitted annually by the Company."

[26] The Bureau of the Budget stated in its report:

> "At the policy level the programs of the Panama Canal and the Panama Railroad Company have their most significant impact in the transportation area. Actions taken by the Canal may vitally affect not only world trade and shipping but also intercoastal trade and transcontinental railroads. The question of toll rates, for example, raises important issues which should be reviewed in the light of the objectives of national transportation policy. Neither the Secretary of Defense nor the Secretary of the Army has at the present the departmental responsibility or the staff resources to deal adequately with policy issues of this character. Military-staff channels are not and should

[fol. 224] It was intended that after defendant prescribed tolls on the basis of the factors which determine how high a toll must be to cover the cost of service, the broader questions of the needs of the national transportation policy and foreign policy would be left as an unlimited delegation [fol. 225] to the President.[27] Defendant is no more than

not be used for this purpose. In the absence of other staff facilities, the Secretary of the Army has been compelled to rely almost exclusively on his administrative assistant, who has numerous other important duties, and the Washington Office of the Panama Canal for assistance on Panama Canal matters.

"Establishment of a special Panama Canal staff in either the Office of the Secretary of Defense or the Secretary of the Army would offer only a partial solution to the problem and might well further complicate coördination of transportation policy. * * *". [The Bureau's recommendation for a complete solution, that this function be given the Secretary of Commerce, was not followed.]

In support of its recommendation that the President be relieved of the work of applying the statutory formula it said:

"Provided that there is agreement as to the formula for establishing the tolls rates and adequate business-type accounts and financial reporting, the actual setting of the tolls rate becomes almost a ministerial function which could well be delegated to the corporation's board of directors. However, since the tolls rate may have an effect on national transportation policy, review and approval of the rate by the President is essential."

(H. Misc. Doc. No. 460, 81st Cong., 2d Sess., 11, 16 (1950).)

[27] See footnotes 25 and 26, *supra*.

The State Department was concerned that there be no violation of the Treaty of 1901 with Great Britain. [Hearings before the Subcommittee on the Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives on H. R. 8677, 81st Cong., 2d Sess., 43, 85-86 (1950)].

a corporate subordinate of the President and the act here in question is subject to the control and nullification by the President. Under such circumstances the courts will not construe it as ministerial. *Marbury* v. *Madison*, 1 Cranch (5 U. S. 137, 170;[28] see also *United States ex rel McLennan* v. *Wilbur*, 283 U.S. 414, 418, 420.

[fol. 226] The courts will, by mandamus, compel an officer to exercise discretion when he has failed to do so because of a misconception of law, *McGrath* v. *Kristensen*, 340 U.S. 162; *Gutnayer* v. *McGranery*, D.C.D.C., 108 F. Supp. 290, modified and affirmed sub. nom. *Brownell* v. *Gutnayer*, C.A.D.C., 212 F. 2d 462; or because of disregard of the statutory standards for the exercise of his discretion, *United States ex rel Accardi* v. *Shaughnessy*, 347 U.S. 260, 268. But mandamus cannot be had to compel the exercise of judgment or discretion in a particular way or to direct the retraction or reversal of action already taken in the exercise of judgment or discretion. *I.C.C.* v. *United States ex rel Members of Waste Merchants Ass'n. of N.Y.*, 260 U.S. 32, 34; *Wilbur* v. *United States ex rel Kadrie*, 281 U.S. 206, 218. Unless plaintiffs merely seek to have defendant formalize its views on tolls, a step not required by the statute, there could be no possible use of mandamus here except

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[28] "* * * Where the head of a department acts in a case, in which executive discretion is to be exercised, in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct would be rejected without hesitation. But where he is directed by law to do a certain act, affecting the absolute rights of individuals, *in the performance of which he is not placed under the particular direction of the President*, and *the performance of which the President cannot lawfully forbid*, and therefore, is never presumed to have forbidden; as, for example, to record a commission or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived, on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department." (p. 170). (Emphasis supplied).

to compel the defendant to act in a particular way, to compel it to prescribe tolls upon a formula it has in its discretion declined to use. Mandamus will not lie to direct discretion in this manner. *United States ex rel Roughton* v. *Ickes*, C.A.D.C., 101 F. 2d 248, 253. Here the discretion given defendant as to whether to change to the new formula is so unrestricted that even if its action could be regarded as [fol. 227] final rather than advisory to the President, there could be no legislative standard applicable as a basis for court interference as long as defendant earns enough revenue to carry out the Canal functions contemplated by the statute.[29] Accordingly the complaint must be dismissed for lack of jurisdiction over the subject matter.

Even though defendant's duty were held to be mandatory rather than permissive it would be necessary to dismiss the complaint because (1) the action of defendant, being subject to nullification by the President, lacks finality and (2) plaintiffs lack standing to sue.

Even when an administrative agency is independent of the President, its duty to act mandatory, and its determination otherwise reviewable, if its determination is subject to Presidential nullification the court will not review it. Such a determination lacks finality in the sense that the action of the court will not determine any right of the parties. The court cannot control whether the determination of the agency, once given, is heeded or disregarded by the President. Such an administrative order has been held merely advisory and not reviewable, either as to the correctness of the advice or for errors of law. *C. & S. Airlines* v. *Waterman Corp.*, 333 U.S. 103; *Trans World Air-Lines* v. *Civil Aeronautics Board*, 2 Cir., 184 F. 2d 66; *Pan American Airways Co.* v. *Civil Aeronautics Board*, 2 Cir., [fol. 228] 121 F. 2d 810; *Employers Group, Etc.* v. *National War Labor Board*, C.A.D.C., 143 F. 2d 145, 151, cert. den. 323 U.S. 735.[30]

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[29] Cf. *Supervisors* v. *United States*, 4 Wall 435.

[30] *McGrath* v. *Kristensen*, *supra*, 340 U.S. 162, must, of course, be distinguished. In that case the court compelled the Attorney General to exercise his judgment as to whether an alien was worthy of relief by Congress from deporta-

Plaintiffs attempt to distinguish the Civil Aeronautics Act cases because the statute involved (Section 801, 49 U.S. C.A. § 601) expressly required the President's approval of Board action when an application was denied as well as when it was granted.[31] They claim that here the President has only a veto power and that accordingly action by the defendant was final, unless a change in tolls was prescribed. Such a claim places too nice a reliance upon the independence of the defendant's directors from the sole stockholder at whose pleasure they serve. The President, directly as stockholder or through his designee, had ample power to compel defendant to prescribe new toll rates for his consideration if he wanted it to do so. If the President, himself, [fol. 229] were defendant's stockholder, he could not obtain mandamus without first exercising his powers as stockholder. The fact that these powers are held by a designee is not significant; the designee also serves at the President's pleasure.[31a] The corporate policy in issue is of major importance. Removal for difference of view on such a matter would not be such a clumsy means of controlling defendant's action as to be ineffective, particularly in the light of Congress's express reliance on the President's approval of any change. Certainly need for interference by the courts is not great enough to require departure from the position the courts have so persistently and emphatically stated, that they will not act when their action may

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tion even though Congress might ultimately disregard his recommendation. In that case, however, the Attorney General's action was not without effect pending action by Congress. It carried finality as to a stay of deportation up to six months and on this basis the court distinguished *C. & S. Airlines* v. *Waterman Corp.*, *supra.*, 340 U.S. at p. 168. There also Congress had no easily effective means of compelling the Attorney General to advise it.

[31] For a comparable implication of power of the President with respect to non-action see *Trans-World Airlines* v. *Civil Aeronautics Board*, *supra.*, 2 Cir., 184 F. 2d 66, pp. 70-71.

[31a] See footnote 23, *supra.*

be nullified by the executive before it can affect the rights of the parties before it.[32]

[fol. 230] Even if it could be said that defendant's duty to prescribe rates is mandatory, plaintiffs lack standing to sue. To have standing, they must allege a violation of a recognized legal right.[32a] The complaint alleges that defendant has compelled plaintiffs to pay tolls at rates in excess of the standards provided by the 1950 statute, but there is no basis for their claim that they are entitled to [fol. 231] transit the Canal at such tolls. Plaintiffs argue that defendant is analogous to a public utility exacting an unreasonable charge and assume, without supporting authority, that a person has the same right to the use of

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[32] See *C. & S. Airlines* v. *Waterman Corp., supra.*:

> "* * * It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action. * * *". (333 U.S. 113-114).

See *Gordon* v. *United States*, 117 U.S. 697, 702:

> "Congress [cannot] authorize or require this court to express an opinion on a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties and process of execution awarded to carry it into effect. * * * [The judgment] would be merely an opinion, which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this court. * * *".

[32a] *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 125; *Tennessee Power Co.* v. *TVA.*, 306 U.S. 118, 137; Alabama *Power Co.* v. *Ickes*, 302 U.S. 464, 479; Concurring opinion of Mr. Justice Frankfurter, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 150-57.

the Canal as to the services of a common carrier.[33] Assuming, however, that plaintiffs have a right to use the Canal,[34] they were given no right to have tolls fixed in accordance with the formula of Section 412. In the absence of a statute there is no right by users to have tolls fixed at a particular

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[33] No one questions that in the absence of a statute a shipper has a common law right to the service of a common carrier without unreasonable exactions. Cf. *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 436; *Lewis, Etc. Co.* v. *Southern Pac. Co.*, 283 U.S. 654; *Munn* v. *Illinois*, 94 U.S. 113, 122. Nor is there any doubt that the defendant as a government corporation is liable for the commission of torts substantially to the same extent as a private corporation. Cf. *Amy* v. *The Supervisors*, 11 Wall (78 U.S.) 136, 138. By statute defendant is expressly made subject to suit and actions against it have been upheld on previous occasions. Canal Zone Code § 248; 62 Stat. 1078 (1948); *Panama R. Co.* v. *Curran*, 5 Cir., 256 F. 768, 771-72; *Panama R. Co.* v. *Minnix*, 5 Cir., 282 F. 47, 50; See also *The Bank of the United States* v. *Planters' Bank of Georgia*, 9 Wheat. (22 U.S.) 904, 907 (1924).

[34] The Canal Zone Code does not expressly give the right to anyone to use the Canal. Its use and operation are left to regulations by the President. Canal Zone Code § 9. These regulations also do not express a right to use the Canal by any person, but contain extensive and detailed restrictions as to its use. By treaty with Great Britain on November 18, 1901, it was agreed that:

> "1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable. * * *". (32 Stat. 1903).

It is assumed that a person complying with the regulations of the President has a right to use the Canal.

rate.[34a] The statute contains no expression of such a pri-
[fol. 232] vate right. Nor is there any mention of such a right in its legislative history. Congress was concerned with the effect of toll rates upon the national transportation policy as well as with their sufficiency to cover the cost of Canal operation. Although the formula in Section 412 constitutes a complete legislative scheme for the computation of toll rates which will make certain facilities of the Canal self-supporting, no complete standards were enacted for the implementation of the national transportation policy or the preservation of the competitive balance between steamships and railroads. Because of the significance of
[fol. 233] Canal tolls in this respect, the President was given power to disapprove any prescribed change, even though it might conform exactly with the statutory formula.[34b] This power of the President was unrestricted and expressly final and conclusive. Under such circumstances, how can plaintiffs be said to have a right to transit the Canal at rates fixed pursuant to Section 412?

Neither was it Congress's apparent intent to give plaintiffs standing to compel the performance of defendant's advisory function for the President. Congress relied upon the supervision of the President and its own control of defendant's budget to prevent arbitrary action by defendant.[35] In this regard, it is particularly significant that the statute lacks any provision for the initiation of a proceeding for a change in tolls upon complaint of a user, and that the decision not to change tolls need not be based upon any record or hearing. The only requirement for a hearing is *after* notice that a change in tolls has been proposed. Further, the hearing is not one to provide a
[fol. 234] basis for the determination of the rights of users, or or one which will formulate a record upon which a court may review the compliance with the statutory standard. It is of the legislative type, in which an opportunity is given to the public to express its views, but which does not limit

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[34a] *G. T. McGovern Trucking Co.* v. *Moses* (Sup. Ct.), 92 N.Y.S. 2d 550, aff'd. 277 App. Div. 758, 97 N.Y.S. 2d 395; *Lawless* v. *Duval County*, S. D. Fla., 6 F. Supp. 303.

[34b] See footnotes 25 and 26, *supra*.

[35] See footnotes 20 and 25, *supra*.

action to the views expressed.[36] In such a hearing a user of the Canal is given no different standing from any other person.

Defendant also contends that the action is necessarily one against the government. If it is only the President and not the defendant who could make effective the relief plaintiffs seek, the action would be one to be brought against the government and not against defendant. To the extent that plaintiffs' action is based upon the collection of excessive tolls, such is the case. The government never having consented to be sued, and the President being immune from suit,[37] the court could not grant this relief in a suit against the defendant. To the extent that the action merely seeks to compel the defendant to perform an alleged mandatory duty owed the public, it may be that the action is properly brought against the defendant, but as [fol. 235] already explained, it must be dismissed upon other grounds.

Complaint dismissed.

Lawrence E. Walsh, United States District Judge.
June 28, 1956.

6/29 56 Judgment Entered, William V. Connelly

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[36] See *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294; *United States* v. *Bush & Co.*, 310 U.S. 371.

[37] *Mississippi* v. *Johnson*, 4 Wall (71 U.S.) 475, 499-501.

[fol. 236] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 111—October Term, 1956

(Argued November 13, 14, 1956)

Docket No. 24226

GRACE LINE, INC., et al., Plaintiffs-Appellants

and

NATIONAL BULK CARRIERS, INC., et al., Intervening Plaintiffs-Appellants

v.

PANAMA CANAL COMPANY, Defendant-Appellee

OPINION—April 8, 1957

Before: CLARK, Chief Judge, and FRANK[1] and HINCKS, Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Lawrence E. Walsh, *Judge*.

Grace Line, Inc., and eleven other United States flag shipping lines, suing on behalf of all users of the Panama Canal, together with certain intervening plaintiffs, appeal [fol. 237] from a dismissal, D. C. S. D. N. Y., 143 F. Supp. 539, for want of jurisdiction, of their complaint seeking to compel Panama Canal Company to prescribe tolls as required by recent congressional legislation and to recover damages for its past failure to do so. Reversed and remanded for a judgment for plaintiffs as stated.

C. Dickerman Williams, of Maclay, Morgan & Williams, New York City (J. Stewart Harrison, of Brobeck, Phleger & Harrison, San Francisco, Cal., and William I. Stoddard, of Maclay, Morgan & Williams, New York City, on the brief), for plaintiff-appellants and intervening plaintiff-appellants.

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[1] Judge Frank heard arguments in this case, but died before this opinion was prepared.

George Cochran Doub, Asst. Atty. Gen., Washington, D. C. (Leavenworth Colby, Chief, Admiralty & Shipping Section, Dept. of Justice, Washington, D. C., Paul A. Sweeney and Herman Marcuse, Attys., Dept. of Justice, Washington, D. C., and Benjamin H. Berman, Atty. in Charge, Admiralty & Shipping Section, Dept. of Justice, New York City, on the brief), for Panama Canal Company, defendant-appellee.

Brief by James M. Estabrook, New York City, as *amicus curiae* in support of plaintiffs-appellants.

CLARK, *Chief Judge*:

This appeal concerns the power of a federal district court to compel the government corporation which operates [fol. 238] the Panama Canal to set tolls according to the new formula established by Congress in 1950 and to repay canal users several million dollars damages for excess tolls charged. It raises interesting and important questions as to judicial responsibility and authority when administrative action is dilatory or lacking.

A class action by canal users seeking this relief ended in summary judgment for the defendant below, when Judge Walsh concluded that he lacked jurisdiction over the subject matter and over an indispensable party. In brief, he interpreted the 1950 statute [2] as giving the defendant discretion to defer use of the new formula and denying judicial review of the defendant's decision. The history of toll regulation in the canal illuminates the conflicting interpretations of the most recent statute.

From 1912 to 1948 two different government bureaus operated commercial enterprises in the Canal Zone. Under 1902 legislation the President owned all the stock of Panama Railroad Company, a corporate ancestor of the present defendant which ran a railroad, a shipping line, and miscellaneous ventures. After 1912 there also existed The Panama Canal, an unincorporated agency headed by a governor whom the President appointed. This agency

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[2] Act of Sept. 26, 1950, 64 Stat. 1038, amending Title 2, §§411, 412, of the Canal Zone Code, approved June 19, 1934, 48 Stat. 1122. The Canal Zone Code does not constitute a part of the United States Code.

administered the civil government of the Canal Zone and operated the canal itself.

The President had statutory authority to fix canal tolls at his discretion between 75 cents and a dollar per laden ton, and a formula was worked out by the President, the Treasury Department, and the governor whereby tolls would be set high enough to cover operating expenses of the canal, "interest," and the cost of civil government in the Canal Zone. Canal users protested that the cost [fol. 239] formula was unfair to them, and in later years tolls were set much lower than the formula would have required. As expenses rose, the toll rate required by the formula became greater than the statutory maximum of $1.00, while the toll remained constant at 90 cents a laden ton.

Meanwhile Panama Railroad Company, which bore very little of the burden of government in the Canal Zone, continued its highly profitable operations, returning a surplus to the Treasury. The corporation made no financial reports to Congress and was not supervised by the Bureau of the Budget or the General Accounting Office. In 1948 to obtain greater financial supervision Congress reorganized the defendant's predecessor under federal law as a government corporation,[3] subjecting it to the requirements of the Government Corporation Control Act of 1945.[4] Henceforth it was required to keep books in the fashion of a commercial business for annual submission to Congress after Presidential revision, and it was to be audited periodically by the General Accounting Office, which, in turn, reported to Congress.

The same year President Truman announced a rise in canal tolls to $1.00 per laden ton to meet continuing deficits from The Panama Canal. When the shipping industry responded with severe protests the increase was deferred pending study by congressional committees and the Bureau of the Budget. A three-cornered struggle developed. The railroads wanted to prevent what they considered a subsidy to shipping—operation of the canal below "cost." The Bureau of the Budget wanted increased revenue from

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[3] Act of June 29, 1948, 62 Stat. 1075.

[4] 59 Stat. 597, 31 U. S. C. §§841-871.

the canal operation and better bookkeeping procedures. The shipping lines wanted revision of the formula for [fol. 240] determining "costs" of the canal to enable the canal to be "self-sustaining" without greatly raising tolls.

The resulting compromise is the statute now before us. Ownership of the physical properties of the canal was transferred from the governor's agency to the defendant corporation, now rechristened Panama Canal Company, which was to be operated by its board of directors like a commercial business, dealing with other government agencies on a business footing and meeting its expenditure from its own income. The cost of civil government in the Canal Zone was to be borne by the defendant, in lieu of taxes; and this cost was to be apportioned among the various business enterprises equitably, thus relieving the former heavy burden on the canal operation. As part of the new scheme, toll-making authority was transferred from the President to the defendant, and the statutory maxima and minima were removed. Tolls were to be set to cover costs, which were defined by statute for the first time; and the new cost formula was made more favorable to canal users than the previous informal arrangement of the President, the Treasury Department, and the Governor.[5]

Both Congress and the President retained some control over toll-fixing. The annual budget reports to Congress and the periodic GAO audits required under the Government Corporation Control Act would henceforth cover the operation of the canal, now that it, too, was run by the defendant. The President retained the power to appoint the members of the defendant's board of directors, and no change in tolls could be made without his approval. [fol. 241] For three years after passage of the Act the defendant submitted its annual budgets to Congress, reporting a profit from its combined operations, but not allo-

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[5] The major changes were that interest during construction was no longer included in capital investment; costs of civil government were no longer borne almost exclusively by the canal users; interest was reduced to commercial rates; and military vessels were to pay for their transits. A proposal to allocate half the cost of the canal to national defense was rejected.

cating the cost of interest or civil government among its various enterprises.[6] No objections were taken to these budgets by Congress and no steps were taken by the defendant to change toll rates. The present controversy began in 1955 when the General Accounting Office completed its audit of the defendant and reported:

> "* * * The Company, as a whole, has been self-sustaining. However, the Company did not have available for our examination an analysis to determine the financial results by activities. We have prepared such an analysis by allocating general corporate expenses (interest, net cost of Canal Zone Government and administrative and other general expenses) to the activity operating results reported by the Company. * * *
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> "The analysis of the Company, reported net income of $13,000,000 for 3 years since the reorganization shows that, contrary to the apparent expectation of the Congress, the canal activity had a net income of $28,000,000 and business activities had losses of $15,000,000. * * *
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> "* * * Thus the net income from the canal activity is being used to offset losses from business activities.
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> "* * * We interpret the legislation as precluding any losses sustained by the Panama Canal Company in the operation and maintenance of business facilities being included in the basis for determining tolls under sec- [fol. 242] tion 412(b). Based on the financial results of the canal activity for the past 3 years, toll rates would have to be reduced substantially if hearings were held at this time."[7]

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[6] Defendant's annual reports for the fiscal years ending June 30, 1952, 1953, and 1954, were attached as exhibits to an affidavit submitted by the plaintiffs. Criticism of the defendant's reports is detailed in the Comptroller General's Audit Report to the Congress of the United States on Panama Canal Company and Canal Zone Government for the Fiscal Year Ended June 30, 1955, 29-30 (hereafter cited as 1955 Audit).

[7] Report on Audit of Panama Canal-Zone Government for the Fiscal Year Ended June 30, 1954, 2-3.

The GAO attributed the loss from other business activities to inefficient management, reapportionment of the burden of civil government, and a diminished market for the goods and services of these enterprises.[8] The unexpected profit of the canal operation probably stems from the steady increase in foreign commercial volume since 1947.[9] The General Accounting Office did not believe that existing legislation authorized the defendant to continue recovering business activity losses through canal tolls and unsuccessfully sought amendment of § 412(b) of the 1950 Act to accomplish that end.[10]

Judge Walsh rejected the General Accounting Office's construction of the 1950 amendments, which the plaintiffs support, and approved that of defendant Panama Canal Company. We turn first to this question of statutory interpretation.

[fol. 243] I. Meaning of the 1950 Statute

A. Statutory Text. The old and new versions of §§ 411 and 412 are printed in the margin for comparison, since the first phase of argument concerns the significance of the

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[8] 1955 Audit, 34-36.

[9] In the four years after the transfer of the canal to the defendant, foreign toll revenues rose from $16,935,823 to $23,442,170 per year, while American tolls went from $9,986,708 to $10,407,307. 1955 Audit, 3.

Congress had recognized that future tolls would depend on the volume of traffic, *e.g.*, Sen. Rep. No. 2531, 81st Cong., 2d Sess. 5 (1950), but had not anticipated a rise in volume of such proportions. Shipping line representatives had testified that American commercial volume was declining, while government spokesmen pointed out that the total volume of commercial shipping had gone up sharply in the past year. Hearings before the Subcommittee on Maintenance and Operation of the Panama Canal of the Senate Committee on Armed Services, 81st Cong., 2d Sess. 16, 20, 39 (1950).

[10] 1955 Audit, 1-4, 19.

changes in wording adopted in 1951.[11] The defendant views [fol. 244] § 411 as controlling and finds great significance

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[11] "CHAPTER 23.—TOLLS FOR USE OF CANAL

"411. AUTHORITY [OF PRESIDENT] TO PRESCRIBE [AND CHANGE] MEASUREMENT RULES AND TOLLS.—The [President] *Panama Canal* Company is authorized [subject to the provisions of the section next following] to prescribe and from time to time change *(1) the rules for the measurement of vessels for the Panama Canal, and (2), subject to the provisions of the section next following,* the tolls that shall be levied [by the Government of the United States] for the use of the Panama Canal [; but no tolls when prescribed as above shall be changed unless six months' notice is given by the President by proclamation.] *: Provided, however, That the rules of measurement, and the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section: Provided further, That the said corporation shall give six months' notice, by publication in the Federal Register, of any and all proposed changes in rates of tolls, during which period a public hearing shall be conducted: And provided further, That changes in basic rules of measurement and changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive.*

"412. BASES OF TOLLS [; MAXIMUM AND MINIMUM RATES].—*(a)* Tolls on merchant vessels, army and navy transports, colliers, *tankers*, hospital ships, supply ships, and yachts shall be based on net vessel-tons of one hundred cubic feet each of actual earning capacity determined in accordance with the [Rules] *rules* for the [Measurement] *measurement* of [Vessels] *vessels* for the Panama Canal, [prescribed by the President and as may be modified by him from time to time by proclamation,] and tolls on other floating craft shall be based on displacement tonnage. [Provided, That the basic rules of measurement shall not be changed except after public hearing and six months' public notice of such change. The rate of tolls on laden

in the use of the verb "authorizes," which it contrasts with the mandatory word "shall," found in other parts of the

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vessels shall not exceed $1, nor be less than $0.75 per net vessel-ton as determined under the aforesaid rules, and] *The rate of tolls* on vessels in ballast without passengers or cargo [the rate] may be less than the rate of tolls for vessels with passengers or cargo. [In addition to the tolls based on measurement or displacement tonnage, tolls may be levied on passengers at rates not to exceed $1.50 for each passenger.]

"(b) Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including interest and depreciation, and an appropriate share of the net costs of operation of the agency known as the Canal Zone Government. In the determination of such appropriate share, substantial weight shall be given to the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government.

"(c) Vessels operated by the United States, including warships, naval tenders, colliers, tankers, transports, hospital ships, and other vessels owned or chartered by the United States for transporting troops or supplies, may in the discretion of the President of the United States be required to pay tolls. In the event, however, that such vessels are not required to pay tolls, the tolls thereon shall nevertheless be computed and the amounts thereof shall be treated as revenues of the Panama Canal Company for the purpose of prescribing the rates of tolls, and shall be offset against the obligations of the said corporation under paragraphs (c) and (e) of section 246 of this title, as amended.

"(d) The levy of tolls is subject to the provisions of section 1 of article *III of treaty between the United States of America and Great Britain concluded on*

statute.[12] The plaintiffs reply that § 411 merely identifies the person delegated with toll-fixing power and prescribes the procedure, while the obligation to set tolls according to formula flows from § 412, where the mandatory language is found.

Defendant next points to the retention in § 411 of the words "prescribe and from time to time change" which were [fol. 245] also used in the earlier version of the statute conferring discretionary power on the President. From this we are asked to infer that similar discretionary power is to be exercised by the new authority. Plaintiffs reply that the old scheme was only discretionary within statutory limits and that on occasion the President sought congressional approval even for changes within these limits.[13] They also cite the first section of Article III of the Hay-Pauncefote Treaty of November 18, 1901, restricting Pres-

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November 18, 1901, of articles XVIII and XIX of the convention between the United States of America and the Republic of Panama [entered into] *concluded on* November 18, 1903, and of article I of the treaty between the United States of America and the Republic of Colombia proclaimed on March 30, 1922.

"*(e) Capital investment for interest purposes shall not include any interest during construction.*"

[12] And see, *e.g.*, *U. S. ex rel. McLennan* v. *Wilbur*, 283 U.S. 414, 418, 420; *U. S. ex rel. Simons* v. *Hines*, D. C. Cir., 69 F. 2d 229. But see *Supervisors* v. *United States*, 71 U.S. 435, 4 Wall. 435, 445-447; *United States Sugar Equalization Board* v. *P. De Ronde & Co.*, 3 Cir., 7 F. 2d 981, 985-986, certiorari dismissed 271 U.S. 691.

[13] In 1937 confusion over the statutory definition of tonnage led President Roosevelt to appoint a committee, which recommended revision of § 412 to provide for measurement rules. Sen. Doc. No. 23, 75th Cong., 1st Sess. On August 24, 1937, the committee's recommendation was enacted by Congress, 50 Stat. 750, and the President revised tolls accordingly three days later. Presidential Proclamation No. 2248, 2 Fed. Reg. 1765-1774.

idential discretion by the requirement that all tolls be "just and equitable." [14]

The transposition of the phrase "subject to the provisions of the section next following" to modify the word "change" instead of the word "authorized," indicates to the defendant that the mandatory provisions of § 412 were applicable only when and if changes in tolls were attempted. Plaintiffs however contend that the transposition, if at all significant, meant only that toll-making was subject to § 412, while the rules for measuring vessels were not. The plaintiffs also say that another part of the statute making the legislation [fol. 246] effective as of the time when the President transferred the canal to the corporation[15] answers the defendant's claim that §§ 411 and 412 fail to specify when the formula should go into effect, thus indicating discretion to delay utilizing the new scheme.

Finally, the defendant draws us to the proviso in § 411 that "the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section." But this may have been intended to continue the legal authority of the old tolls fixed by the President during the interregnum when the Presi-

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[14] "The United States adopts, as the basis of the neutralization of such ship canal, the following Rules, substantially as embodied in the Convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal, that is to say:

"1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable." 32 Stat. 1903. The treaty is incorporated by reference into § 412(d), Tit. 2, of the Canal Zone Code.

[15] Act of Sept. 26, 1950, § 14, 64 Stat. 1043. The transfer occurred July 1, 1951. Exec. Order No. 10263, 16 Fed. Reg. 6333.

dent was no longer authorized to promulgate tolls and his corporate successor had not yet promulgated any, and would not be inconsistent with plaintiffs' position.

Summing up, the defendant would read the two sections as governing any future effort to change tolls, but leaving it entirely up to the defendant when and if any changes should be attempted. The plaintiffs just as cogently glean from the language a requirement that once the properties of the canal are given to the defendant the new formula must be applied with reasonable speed. Both interpretations are reasonable from the naked words, and we must seek further for their meaning.

B. Legislative History. During the three-year legislative progress of the statute there was no discussion of the possibility that the new law would work out to mean a drop in toll rates which the defendant might be reluctant to announce. The universal assumption of legislators and lobbyists was that the new § 412 would authorize an increase in some amount,[16] which the defendant would [fol. 247] announce as soon as the necessary computations were completed.[17] The shipping industry, for example, lobbied to place a $1.00 maximum on tolls, holding the rise to 10 cents a laden ton.[18] The old informal formula of the

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[16] Hearings, *supra* note 9, at 8, 15, 28; Hearings before the Subcommittee on the Panama Canal of the House Committee on Merchant Marine and Fisheries, 81st Cong., 2d Sess. 68, 141 (1950); Sen. Rep. No. 2531, 81st Cong., 2d Sess. 5 (1950); 96 Cong. Rec. 13375, 14672 (1950).

[17] The Bureau of the Budget, which presented the bill which became law, expected the computations to take one year. A Report and Recommendations of the Bureau of the Budget, H. R. Doc. No. 460, 81st Cong., 2d Sess. 16 (1950) (hereafter, Bureau of the Budget Report); Hearings, *supra* note 16, at 48.

[18] *E.g.*, Hearings, *supra* note 16, at 76-82; Hearings, *supra* note 9, at 11-17. The proposal passed the House, but was rejected by the Senate Committee. Sen. Rep. No. 2531, 81st Cong., 2d. Sess. 4 (1950).

President, the Treasury Department, and the governor had long indicated that an increase was in order;[19] and since 1948 the President had been impatient to proclaim the maximum statutory toll.[20] The major concern was that the defendant might be required by rising costs to raise tolls to the point where the intercoastal shipping industry could no longer compete with the railroads,[21] and the statutory proviso that toll increases be approved by the Presi-[fol. 248] dent was designed to safeguard the ship lines in that eventuality.[22]

The scope of the defendant's discretion must therefore be inferred from the general scheme of regulation which Congress created. The major change was the transfer of toll-making authority from the President to a government corporation organized on commercial lines. This was coupled with abandonment of the old statutory maxima and minima in favor of a single requirement that tolls cover costs. The latter were carefully delineated by Congress for the first time. These changes together spell an

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[19] The last time the old formula indicated the propriety of reducing tolls was in 1931, and the following year the formula was revised to remove the national defense write-off of some canal costs. Hearings, *supra* note 9, at 39. At the time the 1950 statute was passed, application of the old formula would have meant an increase of from 45 to 50 cents per ton. Hearings, *supra* note 9, at 7, 17, 24.

[20] On March 26, 1948, President Truman proclaimed a toll rise effective in six months. Presidential Proclamation No. 2775, 3 CFR 30 (1948 Supp.). The effective date was postponed to March 1, 1949, September 1, 1949, March 1, 1950, and finally March 1, 1951, while Congress considered the present statute; and upon passage of the present law the original announcement of an increase was revoked. Presidential Proclamation No. 2903, 3 CFR 56 (1950 Supp.), revoking Proclamations 2775, 2808, 2831, 2852, and 2875.

[21] Hearings, *supra* note 9, at 11, 14-16, 27, 36, 39; Hearings, *supra* note 16, at 67-69, 82-83, 102-125, 133-134, 142-152.

[22] Hearings, *supra* note 9, at 7; Bureau of the Budget Report at 17.

intention to change toll-making from a political decision made by the President to an economic decision made by the defendant corporation.[23]

A certain latitude was allowed the defendant in deciding how frequently to change tolls, but this was limited by the requirement that in the long run tolls must reflect costs.[24] Congress was expected to review these short-range

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[23] *E. g.*, "If there is agreement as to the formula for establishing the toll rates and adequate business-type accounts and financial reporting, there is no sound reason for not delegating the rate-making function to the Company's Board of Directors, as has been done in the case of other Government corporations, such as TVA, which set the rates to be charged for their services." Statement of Harold Seidman, Accompanied by Russell Roane, Representing the Bureau of the Budget, Hearings, *supra* note 9, at 7, and Hearings, *supra* note 16, at 46. See also Bureau of the Budget Report at 16.

Throughout the hearings and debate it was assumed that, under the new law, tolls would be set by the defendant to make the canal self-sustaining, and there was virtually no mention of the President's veto power. Hearings, *supra* note 9, at 9, 11, 18, 27, 36; Hearings, *supra* note 16, at 54, 66, 68, 133, 139; 96 Cong. Rec. 13371-13380, 14671-14672.

[24] "The present basis of establishing tolls rates does not lend itself to the ready adjustment of rates, either up or down, to reflect increases or decreases in costs or changes in commercial conditions. * * * It is significant that the tolls rates have not been changed under this formula since 1938.

"* * * *

"While the tolls rate should not be changed on a year-to-year basis since 1 year's experience is insufficient to reflect accurately long-range trends, the rate should be adjusted periodically as changes take place in the factors that determine the charges that should be made for the use of the Canal. As the 1937 special committee expressed it:

"'Economic and commercial conditions are not static. The Panama Canal is a facility for the service

[fol. 249] decisions with the aid of the defendant's annual budgets, but neither Congress nor the defendant was authorized to ignore the statutory formula indefinitely for reasons of policy or convenience.[25]

This last power was given the President, apparently to protect the American shipping industry.[26] Exercise of the Presidential veto was hardly discussed during the legislative history of the Act, and the apparent assumption of all concerned was that as a general rule the defendant's rate changes would become law. It was clear to Congress that the Hay-Pauncefote Treaty forbade discrimination against foreign vessels, so that any Presidential veto of rate increases would have to subsidize not only American lines, but the foreign lines, which comprised more than half the canal's commercial volume.[27]

That the defendant would defer toll changes in order to apply canal profits to cover its losses in other enterprises never occurred to the legislators. Although the cost formulae of the other ventures were not spelled out in the stat[fol. 250]ute, each enterprise was expected to be self-sustaining[28] and the annual commercial-style budget of

> of interoceanic commerce. The charges for the service should receive such adjustments from time to time as will keep the charges in harmony with the needs of the Canal and the requirements that must be met in making the Canal the servant and assistant of international intercourse.'" Bureau of the Budget Report at 16.

Congress recognized the possibility that in the long run the new formula might require reduction of tolls. Bureau of the Budget Report at 16; Hearings, *supra* note 9, at 18, 36; Hearings, *supra* note 16, at 139; Sen. Rep. No. 2531, 81st Cong., 2d Sess. 5 (1950).

[25] Hearings, *supra* note 16, at 49-50.

[26] Notes 21, 22 *supra*.

[27] Hearings, *supra* note 9, at 13, 23; Hearings, *supra* note 16, at 67, 146-147; 96 Cong. Rec. 13373-13379.

[28] Bureau of the Budget Report at 14; Hearings, *supra* note 9, at 8, 18-19, 22; Hearings, *supra* note 16, at 66-67, 74; Sen. Rep. No. 2531, 81st Cong., 2d Sess. 4 (1950); H. R. Rep. No. 2935, 81st Cong., 2d Sess. 3 (1950).

the defendant corporation was expected to facilitate congressional scrutiny of the various operations. Until the GAO audit the defendant's ambiguous bookkeeping concealed the fact that the Treasury was being deprived of profits made in operating the canal, so that consumers of goods and services furnished by the other ventures could enjoy them below cost—the very type of subsidy the Government Corporation Control Act and the 1951 amendments to the Panama Canal Act were designed to prevent. The men who spent three years hammering out a compromise toll formula for future operation of the canal did not mean to give the defendant's board of directors carte blanche to ignore the statutory mandate whenever the defendant's other business ventures were losing money.

We conclude that Panama Canal Company was expected to propose changes in tolls for Presidential approval whenever it became apparent that tolls were substantially out of line with costs. While it was given discretion to defer proposals of change for short periods of time where it believed the discrepancy between costs and revenue was due to a temporary factor, it could not delay such proposals unreasonably long.

II. Defendant's Asserted Discretion to Delay

Defendant contends that, even if it was required to propose changes with reasonable frequency, it has been justified in delaying action until an appraisal of the property was completed, without which depreciation and interest [fol. 251] could not be accurately estimated.[29] The appraisal has now been finished and further delay cannot be justified on that ground.[30] It further suggests that the Korean War, pending legislation to alter § 412, and the 1955 treaty with Panama have introduced "uncertainty

[29] The defendant gives at its reason for not promulgating new tolls on its estimate of the property's value: "In view of the policy that tolls should remain stable over a period of years, it is evident that Congress did not intend tolls to be determined upon so tenuous and temporary a basis." Defendant-Appellee's Brief, p. 42.

[30] *Id.* p. 43.

rendering it unwise to change tolls at the present time." It has been five years since the new formula went into effect and almost two decades since the tolls were last changed. Uncertainty has become the norm in world affairs. The legislative policy is to make tolls reflect changes in these uncertainties, and not to suspend all changes until world conditions become static;[31] further delay is not an exercise of the defendant's conceded discretion to determine the frequency of toll changes, but an arbitrary refusal to obey the mandatory requirement of § 412 that tolls be set in accord with costs.

III. Judicial Review of Administrative Non-Action

We thus reach the question of judicial review. Judge Walsh stated his conclusion that such review was not intended by Congress in several ways: failure to join the United States as an indispensable party; no standing to sue; inability to compel a government officer to exercise his discretion by writ of mandamus; and lack of finality in the defendant's action, which is subject to Presidential revision. On appeal defendant also suggests that a district court outside the District of Columbia lacks power to issue writs of mandamus, and that courts should not review the management of the public domain.

[fol. 252] There is nothing in §§ 411 and 412 expressly authorizing or expressly precluding judicial review. Unless constitutional limitations exist, our power to grant relief in the premises is a matter of congressional will; and these various doctrines only point up relevant factors in our search for the silent legislative intent. We turn first to the problem of Presidential revision.

Defendant states, and we agree, that we have no power to review government decisions which are not final, and that tolls proposed by the defendant, but not yet approved by the President, lack the requisite finality. *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103; *Pan American Airways Co.* v. *C. A. B.*, 2 Cir., 121 F. 2d 810. In this suit, however, we are concerned not with proposed rate changes, but with the defendant's refusal to make such proposals—a decision which has finality and

[31] See note 24 *supra*.

which is certainly effective without any approval by the President. The defendant's refusal to start the machinery for toll changes is like a court's refusal to start the process of adjudication by granting a defendant's motion to dismiss a complaint. Such a decision is a final order, although the opposite decision, denying the motion, would not be.

From the cases of *Chicago & Southern Air Lines v. Waterman S. S. Corp., supra*, 333 U. S. 103, and *Pan American Airways Co. v. C. A. B., supra*, 2 Cir., 121 F. 2d 810, the defendant argues that, where Congress establishes an agency whose decisions require Presidential approval, all judicial examination of the agency's action or inaction is precluded. But the cases will not support so broad a proposition. Both those cases dealt with the construction of § 1006 of the Civil Aeronautics Act, 49 U. S. C. § 646, which authorizes judicial review of certain orders of the Civil Aeronautics Board; and the decision of this court and the Supreme Court was that the section did not authorize [fol. 253] review of Board orders granting or denying citizen carriers' applications for certificates of convenience and necessity to engage in overseas and foreign air transportation. Justice Jackson, writing for the Supreme Court majority, did not state the sweeping proposition now urged to us, but listed the factors which led him to conclude that § 1006 was not meant to include review of that type of agency decision: (1) Congress had expressly precluded judicial review of foreign carriers' applications to engage in foreign or overseas routes, suggesting a similar policy toward domestic carriers' applications of the identical kind; (2) air commerce, by virtue of its third dimension, novelty, and danger, poses special problems not present in the regulation of ship, truck, or train transportation; (3) aerial navigation routes and bases must be correlated with national defense plans and the conduct of foreign relations; (4) the express scheme for review of CAB decisions was to permit it where the Board performed conventional functions and to preclude it where the Board inverted the usual administrative process and acted as adviser to the President; (5) the President's role in the statutory plan was to coordinate legislative and executive powers to further the commercial, strategic, and diplomatic interests of this country in the realm of foreign affairs.

None of these considerations are present here. The defendant is a government corporation, expressly made suable on all its decisions without reservation. The subject matter being regulated—marine transportation—is familiar to the courts, as is the process of rate-making. The defendant's decisions are not complicated by factors of diplomacy or national defense, since the Hay-Pauncefote Treaty forbids use of the canal toll rate as a weapon of foreign policy. Accordingly the defendant's decisions will not involve national defense data and secret foreign intelligence, as was [fol. 254] the case under the Civil Aeronautics Act.[32] The CAB's standard of "convenience and necessity" was much more vague than the formula expressed in § 412 to which the defendant corporation is to be held; and the type of CAB decisions discussed by the Supreme Court concerned the rate of expansion of the air transport industry, rather than, as here, the price to be paid by consumers to a government monopoly for services of a type frequently supplied by a public utility.[33]

It may be significant that review was sought in the case before the Supreme Court at a much later stage than here. There "submission of the Board's decision was made to the President, who disapproved certain portions of it and advised the Board of the changes which he required. The Board complied and submitted a revised order and opinion which the President approved. Only then were they made public, and that which was made public and which is before us is only the final order and opinion containing the Presi-

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[32] *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103, 111-112. Unlike the present law, the statute before the Supreme Court provided that CAB decisions "shall be submitted to the President before publication thereof." 49 U. S. C. § 601.

[33] At the time the present statute was passed the most comparable waterway was the Suez Canal, then privately-owned. The tolls policy in Suez was frequently compared with that in Panama, Hearings, *supra* note 9, at 34, 37; Hearings, *supra* note 16, at 69-70, 135, 137-138, 142; 96 Cong. Rec. 13373; and the international treaty incorporated in § 412(d) of the present statute was modeled on that governing the Suez Canal. See note 14 *supra*.

dent's amendments and bearing his approval." *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, *supra*, 333 U. S. 103, 110. It may well be that no judicial review would be possible once the defendant's original proposal has been altered to conform with the President's political decision [34] but that question is not now before us.

[fol. 255] Panama Canal Company claims that we cannot now ignore the question, however, since it would be irresponsible to mandamus the defendant to action which would then be beyond judicial scrutiny. Assuming that this is true, it appears that in the normal situation tolls would be set by the defendant and approved by the President without alteration; there would then be no obstacle to court review. Although, on occasion, the President may intervene and thus preclude judicial review of the new rates, the mere possibility of frustration should not deprive the district court of the power to take the first step. See *Virginian R. Co.* v. *System Federation No. 40*, 300 U. S. 515; *Wilbur* v. *U. S. ex rel. Kadrie*, 281 U. S. 206, 218.

Nor is the defendant a mere adviser to the President of the type discussed in *United States* v. *George S. Bush & Co.*, 310 U. S. 371—a decision under the Tariff Act of 1930 (46 Stat. 590). The Act authorized the Tariff Commission to recommend increases in the statutory import duties if existing duties failed to equalize production costs of foreign and domestic articles. A recommendation to increase the duty on canned clams was approved by the President with the statutory finding that "in his judgment such rates of duty are shown by such investigation of the commission to be necessary to equalize such differences in costs of production." The Court of Customs and Patent Appeals, authorized to review "a question or questions of law only," held the increase invalid because in computing the cost of Japanese production the Commission and the President converted yen into dollars at the 1932 rate of exchange, instead of the rate of earlier years before Japan went off the gold standard. The Congress had deliberately failed to specify the year on which exchange rates should be con-

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[34] *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103, 112-114; but see *Shaughnessy* v. *Pedreiro*, 349 U. S. 48.

puted, and the President's method of solving the problem was held nonreviewable by the Supreme Court. "What-[fol. 256] ever may be the scope of appellate jurisdiction conferred by § 501 of the Tariff Act of 1930, it certainly does not permit judicial examination of the judgment of the President that the rates of duty recommended by the Commission are necessary to equalize the differences in the domestic and foreign costs of production." *United States* v. *George S. Bush & Co., supra*, 310 U. S. 371, 379. The Court carefully limited its language to tariff acts, where for a century the President had been given wide discretion to make such decisions; and it noted that the Tariff Commission had traditionally acted as an adviser only, either to Congress or to the President. The differences between the background, subject matter, and language of the tariff statute and the present law dispel any inference that Congress intended the same scope of review for canal users as for importers of foreign commodities.

Even assuming the scope of review under that statute and this one to be the same, we think the Supreme Court would have allowed the Court of Customs and Patent Appeals to act in the event the Tariff Commission, like the present defendant, boldly refused to hold any hearings concerning rate changes despite adequate indications that changes were necessary to comply with the statutory formula. The present case would be more comparable to the *Bush* decision if the present plaintiffs were trying to declare new tolls invalid because of the type of depreciation computation chosen by the agency and approved by the President.

Before 1950 the President was authorized to set tolls, and the epithet "adviser" could properly be applied to the governor of The Panama Canal. But if the changes in § 411 are to have any meaning the defendant is now the rate maker, and not a counselor. The legislative history similarly supports this.

[fol. 257] As a last resort the defendant presses on us cases involving administration of the public domain;[35]

[35] *E.g., United States* v. *Midwest Oil Co.*, 236 U. S. 459, 474; *Butte City Water Co.* v. *Baker*, 196 U. S. 119, 126; *Alabama* v. *Texas*, 347 U. S. 272, 273; *United States* v. *San*

but the problems presented by them are far removed from those of a government corporation, organized on a commercial model, charging consumers for the type of services ordinarily supplied by private enterprise. Moreover, the public domain cases have no factor analogous to the treaty—the Hay-Pauncefote Treaty, *supra*—which here binds the government to conduct its venture in a fashion that will provide fair and equitable tolls for users of all lands. Compare *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 128, 129, which the defendant cites.

The growing tendency of the courts and Congress has been to submit more matters once thought to concern internal government administration to examination in open court. See, *e.g.*, *Honovich* v. *Chapman*, D. C. Cir., 191 F. 2d 761 (Secretary of the Interior's regulations concerning Indians' wills); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123 (Attorney-General's listing of organizations for use in screening government personnel); *Shachtman* v. *Dulles*, D. C. Cir., 225 F. 2d 938 (passport denial); *Textile Workers Union of America* v. *Allendale Co.*, D. C. Cir., 226 F. 2d 765 (Walsh-Healey Act determinations reviewable under the Fulbright Amendment, 66 Stat. 308, 41 U. S. C. § 43a, which overruled *Perkins* v. *Lukens Steel Co.*, *supra*, 310 U. S. 113); Administrative Procedure Act, 5 U. S. C. § 1009(c), "every final agency action for which there is no other adequate remedy in any [fol. 258] court shall be subject to judicial review." We think the intent of Congress was to allow judicial review in these circumstances.

Nor is there any lack of standing to sue. Section 10(a) of the Administrative Procedure Act, 5 U. S. C. § 1009(a), confers standing on persons "suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute," and the plaintiffs can point to the Panama Canal Act of 1912, as amended in 1951, as well as the Hay-Pauncefote,

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Francisco, 310 U. S. 16, 29-30; *Light* v. *United States*, 220 U. S. 523, 537. *Cf.* Section 4 of the Administrative Procedure Act exempting from some rule-making requirements "any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." 60 Stat. 238, 5 U. S. C. § 1003.

Treaty, as their statutory authority. Moreover, without legislation they have a right to judicial redress, since the corporation's action in charging tolls in excess of the statutory rate was "of a sort that, if taken by a private person, would create a right of action cognizable by the courts."[36] *Joint Anti-Fascist Refugee Committee* v. *McGrath*, *supra*, 341 U. S. 123, 152 (concurring opinion of Justice Frankfurter).

Here there is no controversy over the proper person to sue; all users of the canal have been joined in a single class action. The question is rather whether or not there is to be judicial review, since a finding of no standing here means that the courts have no power in the premises. See *Joint Anti-Fascist Refugee Committee* v. *McGrath*, *supra*, 341 U. S. 123, 186 (concurring opinion of Justice Jackson). From all that has gone before we conclude that court relief was not precluded and that the plaintiffs may seek it.

A final argument is made that legislative and executive supervision is sufficient and that judicial interference will prove cumbersome. The President's power to remove mem- [fol. 259] bers of the defendant's board of directors and his veto power are stressed in this connection, as well as the supervisory power wielded by Congress through annual appropriation bills. But identical balances and checks rein most government agencies, whose decisions are nevertheless subject to judicial scrutiny. For the person unable to get redress from the busy legislature or White House the courts remain open.

IV. The United States as Indispensable Party

The holding that the United States was an indispensable party applies, as we understand the opinion below, only in so far as the plaintiffs seek to recover money from the defendant, and not to the request for injunctive or man-

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[36] The right of a consumer to sue a utility which charges excessive tolls is established, *e.g.*, *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436; *United States* v. *Public Utilities Commission of District of Columbia*, D. C. Cir., 151 F. 2d 609; *Richman* v. *Consolidated Gas Co. of New York*, 114 App. Div. 216, 100 N. Y. S. 81, affirmed 186 N. Y. 209, 78 N. E. 871.

damus relief. We do not pass on the necessity for joining the United States as defendant, since we think a money recovery is precluded by other considerations. Restitution of overcharges would require determination of the tolls that should have been set. Although the district court might reconstruct the tolls which the defendant corporation should have promulgated, there is no way of knowing whether or not the President would have approved them. Moreover, there is no statutory authority for utilizing the defendant's facilities for measuring the amount of money to be awarded the plaintiffs in suits to recover overcharges. See *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 253-255. We find no evidence of a congressional intent to allow recovery of overcharges.

V. Availability of the Remedy of Mandatory Injunction

Panama Canal Company's last argument rests on the doctrine that federal courts outside the District of Columbia lack statutory authority to issue writs of mandamus against government officers in the exercise of their original [fol. 260] jurisdiction. *McIntire* v. *Wood*, 11 U. S. 504, 7 Cranch 504; *Rosenbaum* v. *Bauer*, 120 U. S. 450; *Knapp* v. *Lake Shore & M. S. R. Co.*, 197 U. S. 536; *Covington & C. Bridge Co.* v. *Hager*, 203 U. S. 109. The lower federal courts have not been consistent in handling efforts to avoid this doctrine by actions for mandatory injunctions or declaratory judgment;[37] but we need not review those cases, since the *McIntire* line of cases is inapplicable to an action like the present one against a corporation. *Virginian R. Co.* v. *System Federation No. 40*, *supra*, 300 U. S. 515, affirming 4 Cir., 84 F. 2d 641, 646. The present situation is even more favorable for issuing a mandatory injunction, since by congressional legislation the defendant was made suable in New York, rather than in the District of Columbia.

We conclude that the judgment of dismissal for the defendant should be reversed and summary judgment should be entered for the plaintiffs on their motion therefor to the extent set forth in, and in accordance with, this opinion.

Reversed and remanded for judgment for the plaintiffs.

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[37] See Note, 38 Col. L. Rev. 903 (1938).

[fol. 261] In United States Court of Appeals for the Second Circuit

Grace Line, Inc., et al., Plaintiffs-Appellants

v.

Panama Canal Company

Judgment—April 8, 1957

Appeal from the United States District Court for the Southern District of New York.

This cause came to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and action remanded for judgment for plaintiffs in accordance with the opinion of this Court; with costs to the appellant.

A. Daniel Fusaro, Clerk.

[fol. 261a] [File endorsement omitted.]

[fol. 262] In United States Court of Appeals, Second Circuit

[Title omitted]

Order Denying Stay of Mandate—April 25, 1957

A motion having been made herein by counsel for the appellee to stay the issuance of the mandate pursuant to Rule 28(c) of the Rules of this court pending application to the Supreme Court of the United States for a writ of certiorari,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 262a] [File endorsement omitted.]

[fol. 263] IN THE UNITED STATES COURT OF APPEALS

OPINION DENYING STAY OF MANDATE—April 30, 1951

Motion denied. In view of the heavy accumulating loss to plaintiff by defendant's failure to perform what this court holds to be its legal obligation and of the ease with which it can seek interim relief from the Supreme Court or a justice thereof if we are in error, a stay of the mandate to prevent even a beginning in the lengthy steps necessary towards compliance with the court's order is not in the interest of justice.

(S.) Charles E. Clark, (S.) Carroll C. Hincks, U.S.C.J.J.

April 30, 1957

[fol. 264] IN UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

[Title omitted]

ORDER DENYING STAY OF MANDATE—May 1, 1957

A motion having been made herein by counsel for the appellee to stay the issuance of the mandate pending application to one of the Justices of the Supreme Court of the United States for a stay of the issuance of the mandate for a writ of certiorari,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 265] [File endorsement omitted]

[fol. 266] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

PANAMA CANAL CO.

v.

GRACE LINE, INC., et al.

MEMORANDUM OPINION—May 7, 1957

On Application for Stay Pending Petition for Certiorari

Mr. Justice Harlan, Associate Justice

This is an application by the Panama Canal Company, a government instrumentality, for a stay of the mandate of the Court of Appeals, pending determination by the Solicitor General as to whether certiorari should be sought to review the decision below and pending further proceedings in this Court, if certiorari is applied for. The Assistant Attorney-General in charge of the case has advised me that he has recommended to the Solicitor General that a petition for certiorari be filed.

The controversy relates to the duties of the petitioner, Panama Canal Company, under the Act of September 26, 1950, 64 Stat. 1038, with respect to establishing tolls for the use of the Canal. The District Court dismissed the complaint, considering that the court had no jurisdiction of the subject matter of the suit, and that the respondent steamship companies had no standing to sue. The Court of Appeals reversed as to the jurisdictional question, and as to the merits, granted summary judgment in favor of the steamship companies. The effect of that decision, as both sides seem to agree, is (a) to require the Panama Canal Company to proceed with a revision of the Canal tolls, in accordance with the Court of Appeals' construction of the 1950 Act, and the accounting views of the General Accounting Office, whose correctness is disputed by the Panama Canal Company; and (b) to deny the steamship companies recovery for excessive past rates, if the [fol. 267] revised tolls should turn out to be lower. The Court of Appeals (Chief Judge Clark and Judge Hincks)

denied petitioner's application for a stay pending review by this Court.*

After hearing the parties and considering their memoranda, I am of the opinion that a stay should issue. Without intimating any views as to the merits, I think the character of the questions involved is such that it cannot be said that it is unlikely that certiorari will be granted. While I recognize the force of the steamship companies' argument that if the decision of the Court of Appeals ultimately stands, the companies will have no recourse for alleged excessive tolls paid by them during the period of a stay, the weight of this argument is diminished by the conceded fact that the companies' present rates to shippers naturally take into account the present Canal tolls. I regard the steamship companies' contention as being outweighed by the undesirability of requiring the Panama Canal Company to go forward with revamping its entire toll structure, until its duty to do so, and the principles on which it should proceed, are finally adjudicated in this litigation. Apart from all else, the fixing of such tolls is not alone a commercial undertaking, but also one that involves this country's relations with the foreign governments whose nationals are users of the Canal.

I am constrained to accept the Government's representations that the uncertainties and confusion which [fol. 268] might ensue from requiring the Panama Canal Company to proceed before this litigation is over might embarrass our relations with such foreign governments. And because of the peculiar position occupied by the Panama Canal Company as a political instrumentality, it seems to me that it should not be required to go forward under the Court of Appeals' decision until the issues in

*"The memorandum of the Court of Appeals is as follows: "Motion denied. In view of the heavy accumulating loss to plaintiff by defendant's failure to perform what this court holds to be its legal obligation and of the ease with which it can seek interim relief from the Supreme Court, or a Justice thereof if we are in error, a stay of the mandate to prevent even a beginning in the lengthy steps necessary towards compliance with the court's order is not in the interest of justice."

this controversy are settled. I think the particular interim interests of these steamship companies must yield to the broader concerns involved in having this litigation proceed to an orderly final conclusion.

I am informed by respondents that they have ascertained that the mandate of the Court of Appeals has gone to the District Court. I shall therefore stay all further proceedings under that mandate pending the filing and determination of the petitioner's petition for certiorari in this Court, upon condition, however, that the petition for certiorari is filed within the time prescribed by law. 28 U. S. C. § 2101 (c).

May 7, 1957.

[fol. 269] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

No. —

[Title omitted]

ORDER STAYING MANDATE—May 7, 1957

Upon consideration of the application of counsel for the petitioner, the opposition of the respondents, and after hearing oral argument,

It is ordered that all further proceedings under the mandate of the United States Court of Appeals for the Second Circuit be stayed, pending the timely filing and determination of petitioner's petition for a writ of certiorari.

(Sgd.) John M. Harlan, Associate Justice of the Supreme Court of the United States.

Dated this 7th day of May, 1957.

[fol. 270] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

PANAMA CANAL CO.

v.

GRACE LINE, INC., et al.

SUPPLEMENTAL MEMORANDUM—May 16, 1957

On Application for Stay Pending Petition for Certiorari

Mr. Justice Harlan, Associate Justice

In view of the representations made in the letter of May 10, 1957, from counsel for the respondents to the Clerk, I shall amend the third and fourth sentences in the first full paragraph on page 2 of my Memorandum of May 7, 1957, to read as follows:

"While I recognize the force of the steamship companies' argument that if the decision of the Court of Appeals ultimately stands, the companies will have no recourse for alleged excessive tolls paid by them during the period of a stay, I regard the strength of this contention as being outweighed by the undesirability of requiring the Panama Canal Company to go forward with revamping its entire toll structure, until its duty to do so, and the principles on which it should proceed, are finally adjudicated in this litigation."

May 16, 1957.

[fol. 271] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1957

Nos. 251 and 252

PANAMA CANAL COMPANY, Petitioners,

vs.

GRACE LINE, INC., et al.; and

GRACE LINE, INC., ISBRANDTSEN COMPANY, INC., LUCKENBACH STEAMSHIP COMPANY, INC., et al., Petitioners,

vs.

PANAMA CANAL COMPANY

ORDER ALLOWING CERTIORARI—Filed October 14, 1957

The petitions herein for writs of certiorari to the United States Court of Appeals for the Second Circuit are granted. The cases are consolidated and a total of two hours allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1958 4-279 513